162

Supreme Court, U.S.
FILED

No. 09-091442 MAY 25 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DENALI, L.L.C. and AMERICAN BUSH, INC.,

Petitioners,

v.

UTAH STATE TAX COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

W. ANDREW MCCULLOUGH
Counsel of Record
6885 South State St.
Suite 200
Midvale, UT 84047
(801) 565-0894
wandrew48@qwestoffice.net

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is Utah Code Ann. Title 59 Chapter 27 a content-based tax which violates the rights of Petitioners to free speech under the First Amendment to the U.S. Constitution?

2. Does the tax pass intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968)?

LIST OF ALL PARTIES

Current (Designated below as Plaintiffs and Appellants in Intervention):

Denali, L.L.C.
American Bush, Inc.

Former Plaintiffs, who have been dismissed from this action:

Bushco, Inc.
Companions Escorts, L.L.C.
TDM, Inc.
Valley Recreation, Inc.
D House, L.L.C.
RBD, Inc.
Wall St. Enterprises, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Denali, L.L.C. is a Utah Limited Liability Company, with no ties to any publicly held corporation. Petitioner American Bush, Inc., is a closely held Utah corporation with no ties to any publicly held corporation.

TABLE OF CONTENTS

Page

OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

POINT I

UTAH CODE ANN. TITLE 59 CHAPTER 27 IS A CONTENT-BASED TAX WHICH VIOLATES THE RIGHTS OF PETITIONERS TO FREE SPEECH 8

POINT II

THE STATUTE IS UNCONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY TEST OF *O'BRIEN* 19

CONCLUSION 26

APPENDIX

1. Decision of the Utah Supreme Court, dated November 20, 2009 ..... App. 1
2. Judgment and Order of District Court, dated July 3, 2007 ..... App. 58
3. Order of Utah Supreme Court denying rehearing, dated February 2, 2010 ..... App. 63
4. Utah Code Ann. §§ 59-27-101 to 108 (2008) ..... App. 65

TABLE OF AUTHORITIES

Page

CASES

677 New Loudon Corp., d/b/a Nite Moves, DTA No. 821458 (N.Y. Tax App., Mar. 12, 2009) 15

677 New Loudon Corp. v. Tax Appeals Tribunal, Docket No. 509646 15

729, Inc. v. Kenton County Fiscal Court, 151 F.3d 485 (6th Cir. 2008) 17

Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989) 16

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 9, 10

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 152 L.Ed.2d 403 (2002) 18

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 12

Big Hat Books v. Blackford County Prosecutor, 565 F.Supp.2d 981 (S.D. Ind. 2008) 17

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 25

Boos v. Barry, 485 U.S. 312 (1988) 13

Bushco v. Utah State Tax Commission, 2009 UT 73, 225 P.3d 153 (Utah 2009) 1, 24

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 12, 24

City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002) 10, 23

TABLE OF AUTHORITIES – Continued

Page

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 11, 14, 23

Combs v. Texas Entertainment Ass'n, Inc., 287 S.W.3d 852 (Tex. Ct. App. 2009) 15

Combs v. Texas Entertainment Ass'n, Inc., Case No. 09-0481 15

Cox v. New Hampshire, 312 U.S. 569 (1941) 16

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 11, 12

Hess v. Indiana, 414 U.S. 105 (1973) 18

Marks v. United States, 430 U.S. 188 (1977) 10

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 9

Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575 (1983) 9

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 9

Pooh-Bah Enterprises v. County of Cook, 232 Ill.2d 463, 905 N.E. 2d 781 (Ill. 2009), *cert. denied*, 130 S.Ct. 258 (2009) 16

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) 18

Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) 17

Schad v. Mount Ephraim, 452 U.S. 61 (1981) 11, 12

Simon & Schuster v. Crime Victims Bd., 502 U.S. 105 (1991) 17

TABLE OF AUTHORITIES – Continued

Page

TDM v. Utah State Tax Commission, 2004 UT App 433, 103 P.3d 190 (Utah App. 2004).....1

Texas v. Johnson, 491 U.S. 367 (1989).....11

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).....11

TK's Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994).....16

United States v. O'Brien, 391 U.S. 367 (1968) ....*passim*

United States v. Playboy Entertainment Group, 529 U.S. 803 (2000).....17

Ward v. Rock Against Racism, 491 U.S. 781 (1989).....21

Young v. American Mini Theatres, 427 U.S. 50 (1976).....11

CONSTITUTION

United States Constitution Amendment I.....*passim*

United States Constitution Amendment XIV.....2, 8

STATUTES

Utah Code Ann. §§ 59-27-101 to 108 (2008).....2, 3

Utah Code Ann. § 78-33-2.....6

28 U.S.C. § 1257(a).....1

28 U.S.C. § 1341.....16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

Robert Hargreaves, *The First Freedom: A History of Free Speech*, Sutton Publishing (London 2002) 10

OPINIONS AND ORDERS BELOW

There is no published opinion from the District Court in this matter. The Memorandum Decision of the District Court is included in the Appendix hereto. The decision of the Utah Supreme Court was entered on November 20, 2009, and is published as *Bushco v. Utah State Tax Commission,* 2009 UT 73, 225 P.3d 153 (Utah 2009). Rehearing was denied on February 2, 2010. A prior appeal was heard by the Utah Court of Appeals on the Tax Commission's contention that this case could not be brought directly to the District Court on a Declaratory Judgment action, and was published as *TDM v. Utah State Tax Commission,* 2004 UT App 433, 103 P.3d 190 (Utah App. 2004), *cert. denied*, 109 P.3d 804 (Utah 2005).

STATEMENT OF JURISDICTION

The decision of the Utah Supreme Court was entered on November 20, 2009, and is published. Rehearing was denied on February 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Amendment I

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code Ann. §§ 59-27-101 to 108 (2008)

Sexually Explicit Business and Escort Service Tax

(See Appendix for text of Act)

STATEMENT OF THE CASE

Petitioners are two exotic dancing establishments in Utah which feature, or would like to feature, nudity as part of their performances. Pursuant to the "Sexually Explicit Business and Escort Service Tax", Utah Code Ann. Title 59 Chapter 27, such performances are subject to a special tax. (App. 65-72). Utah Code Ann. § 59-27-102 defines a "sexually explicit business" as "a business at which any nude or partially denuded individual, regardless of whether the nude or partially denuded individual is an employee of the sexually explicit business or an independent contractor, provides any service" for a fee, and for at least 30 days during a calendar year. (App. 66). Petitioners herein intervened in the original legal action seeking to invalidate the tax, which had been brought by several escort agencies, also the subject of the tax. The tax on escort agencies was invalidated as unconstitutionally vague by the Utah Supreme Court; and those former Plaintiffs do not participate in this Petition. Petitioners herein were designated as Plaintiffs in Intervention, and Appellants in Intervention, in the action below, and participated fully in all aspects of the legal process.

§ 59-27-103 enacts a tax "equal to 10% of amounts paid to, or charged by the sexually explicit business" as defined therein. Pursuant to § 59-27-105, certain portions of the money raised are earmarked for investigation or treatment of sex offenses or offenders. (App. 67, 69-70).

At a Utah House committee hearing, Kathy Okey, an employee of the Department of Corrections, testified regarding sex offenders. She was not introduced as an expert and presented no credentials for such expertise. Ms. Okey spoke of the number of offenders and the need in the correction system for more funding for therapy. Ms. Okey also said:

> I also think it important to point out that there is a cause and effect here. While most people who utilize sexually explicit businesses don't commit sex offenses, the vast majority of sex offenders utilize these kinds of services. So there is a cause and effect there that perhaps they should pay some of that burden. There was an analysis done by Hanson and Busia ["Hanson and Bussiere"] of sex offenders in the United States, Canada and Great Britain. The third top factor that indicates a sex offender's risk is paraphilias. Utilizing these types of services in one example of paraphilias. R.133-134.
>
> A paraphilia is an unusual sexual interest that you really have an obsession with. The ones that most people joke about is like women's shoes or feathers or those kinds of things would be examples. But it is an unusual interest in something. It's not necessarily illegal but generally people [who] have one type of that kind of interest also have others. With sex offenders, it's one of the things that it's a huge risk factor for them. R. 134.

> Accessing escort services or stripper bars is a type of paraphilia and they didn't divide at this percentage. It's just that paraphilia is one of the top contributors when you are looking if someone is going to re-offend. If they have paraphilia, this, it's one of the top things that you look at. R. 138.

The House added intent language to buttress that position after the bill had passed the Utah House of Representatives:

> For the legislature finds the Supreme Court of the United States has upheld the regulation of sexually oriented businesses *because of the deleterious effect they have on the community*. Sexually oriented business, [sic] it is in the best interest of the citizens of this state to provide counseling to individuals who have committed a sex offense. Most sex offenders continue to commit sex offenses if they do not receive treatment. Sex offender treatment is expensive. If an offender has to pay for treatment, restitution and normal living expenses, they generally cannot afford treatment. It is reasonable to tax sexually explicit businesses and escort services in order to provide counseling for individuals who have committed a sex offense. R. 126-127. (Emphasis added).

Petitioner Denali, L.L.C. presents a dance show in Salt Lake City featuring full nudity. As such, it is the only establishment of which Petitioners are aware in the State of Utah which is subject to the "sexually explicit business" tax, based solely on the lack of

adequate attire on its dancers. Petitioner American Bush, Inc. does not serve alcoholic beverages, and is subject to a City ordinance of the City of South Salt Lake. That ordinance is less restrictive than that required of establishments which serve alcohol. American Bush now complies with costume requirements which would be required of establishments which sell alcoholic beverages. A change in the attire would trigger the tax. American Bush, Inc. desires to include nudity in its performances, but fears the effects of the tax on its operations.

Plaintiffs filed an action seeking declaratory judgment, under the Utah Declaratory Judgment Act, Utah Code Ann. § 78-33-2, that the entire act was unconstitutional under the First Amendment to the U.S. Constitution. The district Court held that the tax was on nudity rather than expression and that it was valid under *United States v. O'Brien,* 391 U.S. 367 (1968).

The Utah Supreme Court upheld the law relating to nude dancing, against a First Amendment challenge. The Court ruled:

> ¶10 The similarities between this case and *Erie* are substantial and important. Like the Erie ordinance, the Tax is both generally applicable and neutral as to message. Also like the Erie ordinance, the Tax was enacted, according to the record before us, with the predominant purpose of serving an important state interest unrelated to the substantive content of protected expression. The

Tax is also similar to the ordinance in Erie in that it places only de minimis burdens on erotic nude dancing, a type of expression lying "only within the outer ambit of the First Amendment's protection" and "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." The Tax is distinguishable from the ordinance upheld in *Erie* only in its form and in the fact that the Tax is, in all respects, less broad and less burdensome than the Erie ordinance. (App. 7-8).

¶25 As a threshold matter, it is important to differentiate between the *O'Brien* test for a regulation of conduct that imposes incidental burdens on some protected expression and the test for a regulation of speech that targets secondary effects. Although both tests can be employed in situations that are factually similar, they are two distinct tests directed at two different inquiries. The *O'Brien* incidental burdens test applies to regulations of conduct that are content neutral both on their face and as to purpose. The *Renton* secondary effects analysis applies to regulations of speech that are content based on their face but are asserted to be content neutral as to purpose. And, in a case like this one, where the parties' arguments implicate both *O'Brien* and the secondary effects analyses, understanding the distinctions between the tests is key to reaching the correct result. (Internal citations omitted) (App. 19-20).

¶38 Finally, the Tax satisfies the fourth prong of the *O'Brien* test as well, in that the burdens that the Tax places on protected expression are no greater than necessary. Although the Supreme Court's use of the "no greater than necessary" language in *O'Brien* appears similar to the "least restrictive means" requirement for strict scrutiny, the Court has made clear that this prong does not require the state to show that its chosen means for advancing the substantial state interest is the least restrictive means available. Instead, the fourth prong of the *O'Brien* test *imposes only a requirement that the regulation be "narrowly tailored," in the sense that it "promote a substantial government interest that would be achieved less effectively absent the regulation."* De minimis impacts on protected speech are permissible. (Internal citations omitted) (Emphasis added) (App. 38).

REASONS FOR GRANTING THE WRIT

POINT I

UTAH CODE ANN. TITLE 59 CHAPTER 27 IS A CONTENT-BASED TAX WHICH VIOLATES THE RIGHTS OF PETITIONERS TO FREE SPEECH.

The disputed Tax is a content-based tax which violates the First and Fourteenth Amendments, contrary to the consistent decisions of this Court. This Court, back in 1819, stated: "That the power of

taxing it by the States may be exercised so as to destroy it, is too obvious to be denied." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Since then, this Court has stricken several attempts to tax speech, as a violation of the First Amendment. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) this Court invalidated a license law which required members of the Jehovah's Witnesses to obtain a license before distribution of pamphlets from door to door: "It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional." 319 U.S. at 108. In *Minneapolis Star v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 586 (1983), this Court invalidated a "use tax" on paper and ink used by newspapers:

> Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

This Court, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), invalidated a discriminatory tax on certain magazines, in the State of Arkansas: "'[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" 481 U.S. at 230. The Court reiterated that such a tax must pass strict scrutiny: "the State must show that its

regulation is necessary to serve a compelling State interest and is narrowly drawn to achieve that end." *Id.* at 231.

In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) Justice Kennedy, concurring in the result and providing the fifth vote to support the plurality (see *Marks v. United States*, 430 U.S. 188 (1977)), specifically rejected a content-based tax to deal with secondary effects:

> On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. *A city may not, for example, impose a content based fee or tax.* This is true even if the government purports to justify the fee by reference to the secondary effects. Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech. (Internal citations omitted) (Emphasis added).

The United States declared its Independence in part in rebellion over the hated "Stamp Act", which included a tax on newspapers, in a transparent attempt by the government to control the press.[1]

---

[1] See Robert Hargreaves, *The First Freedom: A History of Free Speech*, Sutton Publishing (London 2002), pp. 114-115; 206-207.

Since that time, the Courts have consistently stricken taxes aimed at speech.

The Utah Court described the tax at issue as falling on nudity and not on expression. No business within the contemplation of the legislature, however, provided services merely by allowing nudity. Only expressive nudity was targeted. Expression is protected by the First Amendment against censorship, even when not verbal. See *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) and *Texas v. Johnson*, 491 U.S. 367 (1989). In *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Court recognized First Amendment protection for topless dancing in places not selling alcohol, on overbreadth grounds, as it would also apply to more "artistic" productions. This tax is censorship and is aimed at expressive conduct without regulating social ills which may accompany such conduct. Furthermore, it would apply to "mainstream" entertainment, should that entertainment be presented for at least 31 days during a calendar year. See also *Schad v. Mount Ephraim*, 452 U.S. 61 (1981). This Court has allowed regulation of nude dancing and other adult entertainment on the basis of "negative secondary effects" generated by establishments which feature such entertainment. See *Young v. American Mini Theatres*, 427 U.S. 50 (1976). *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is the most frequently cited "secondary effects" case:

> The Ordinance by its terms is designed to prevent crime, protect the city's retail trade,

> maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. 475 U.S. at 48.

This Court has allowed "reasonable time, place and manner restrictions" on businesses featuring nude dancing, See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Both the plurality and the dissent in *City of Erie* cited approvingly *Doran* and *Schad*.

The dissent in the Utah Supreme Court recognized what the legislature had done:

> ¶62 Despite the majority's efforts to demonstrate otherwise, this case is not the same as *Erie*. Rather, the Utah Legislature has enacted a statute that, by its own terms, makes it a content-based tax on First Amendment expressive speech; hence strict scrutiny should apply. Because the Utah State Tax Commission (the Commission) cannot show that the Tax is necessary to serve a compelling state interest and is narrowly tailored to that end, I would hold that the Tax violates the First Amendment to the United States Constitution. (App. 44).

This tax was promoted as a reaction to the "secondary effects" of adult businesses, including those which feature nude dancing. The law, however, is not a time, place or manner restriction. It is not

aimed at the local effects of a business at a particular time or place. The legislative history of the Act instead includes an attempt to build a connection between adult entertainment businesses and those who exhibit "paraphilias". However, the link is not that of cause and effect, but simple statistical and anecdotal information that such people may "access" such entertainment. The law is a content-based burden, subject to strict scrutiny. While the Utah Supreme Court rejected the State's arguments concerning "secondary effects", it also rejected strict scrutiny, and upheld the tax under its view of the "intermediate scrutiny" test promulgated in *United States v. O'Brien*, 391 U.S. 367 (1968):

> ¶ 33 A review of the relevant case law shows that the second prong of the *O'Brien* test does not require that the state provide evidentiary proof of a connection between the speech it regulates and secondary effects. Instead, all that is required is that the state show its regulation would advance a substantial state interest. (App. 25-26). See also Point II below.

This Court, in *Boos v. Barry*, 485 U.S. 312, 320 (1988) distinguished between laws aimed at "secondary effects" and those which are content based and require strict scrutiny:

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are

not the type of "secondary effects" we referred to in *Renton*.

This question of constitutional law has become increasingly significant as states and local governments across the nation are considering, and some adopting, various content-based tax schemes. Whether motivated by the exigencies of the current financial crisis, hostility to erotic expression, or both, a growing number of legislatures are considering measures to impose special taxes on such speech.[2] Some state and local tax schemes have resulted in

---

[2] See, e.g., S.B. 44, 95th Leg., Reg. Sess. (Mich. 2009) (proposed excise tax on adult entertainment facilities); S.B. 91 (09 LC37 0904S), 150th Gen. Assem., 1st Sess. (Ga. 2009) (proposed surcharge on sexually oriented businesses); A. 646, 2008-2009 Leg., 2009 Sess. (N.J. 2009) (proposed fee on sexually oriented businesses); A. 7126, 2009-2010 Leg., Reg. Sess. (N.Y. 2009) (proposed surcharge on sexually oriented businesses); A. 8158, 2009-2010 Leg., Reg. Sess. (N.Y. 2009) (proposed surcharge on sexually oriented media); H.B. 809, 106th Gen. Assem., 2009 Sess. (Tenn. 2009) (proposed annual tax of 25% on sales of sexually oriented material); H.B. 2070, 81st Leg., Reg. Sess. (Tex. 2009) (proposed admission fee for certain sexually oriented businesses); H.B. 2291, 79th Leg., 1st Sess. (W. Va. 2009) (proposed tax on sale or rental of obscene materials); H.B. 2242, 80th Gen. Assem., 2d Sess. (Iowa 2004) (proposed 25% tax on "adult enterprises"); S.B. 821, 92nd Gen. Assem., Reg. Sess. (Mo. 2004) (proposed 5% tax on adult entertainment and services); H.B. 1532, 2005 Leg., Reg. Sess. (Okla. 2005) (proposed 10% tax on sexually explicit businesses); H.B. 2466, 2007-2008 Leg., 2007 Sess. (Kan. 2007) (proposed 10% tax on sexually explicit businesses); A.B. 1551, 2007-2008 Leg., Reg. Sess. (Cal. 2007) (proposed 8% tax on adult entertainment enterprises); H.B. 304, Leg., Sess. 2009 (Pa. 2009) (proposed fee on sexually oriented businesses).

litigation in the lower courts, with mixed results. Without reaching constitutional issues, the New York Division of Tax Appeals reversed an initial finding of the Department of Taxation and held that an amusement sales tax exemption for "dramatic or musical arts performances" also applies to adult entertainment cabarets. *677 New Loudon Corp., d/b/a Nite Moves*, DTA No. 821458 (N.Y. Tax App., Mar. 12, 2009) ("that the dance routines are seductive in nature and titillation of a patron is the outcome, simply does not render such dance routines as something less than choreographed performances, or remove them from the exception to the general rule of [the] Tax Law"). That decision was recently reversed by the New York Tax Appeals Tribunal in *677 New Loudon Corp. d/b/a Nite Moves,* DTA No. 821458, reinstating the assessment on April 14, 2010. Constitutional issues were disposed of in one short paragraph at the end of the decision, without citation of authority. That case is now pending before the Appellate Division of the New York Supreme Court, Third Dept., as *677 New Loudon Corp. v. Tax Appeals Tribunal*, Docket No. 509646. The Texas Court of Appeals, in *Combs v. Texas Entertainment Ass'n, Inc.*, 287 S.W.3d 852, (Tex. Ct. App. 2009) invalidated a five dollar per customer charge on patrons of live nude entertainment. That case is now pending before the Supreme Court of Texas, as *Combs v. Texas Entertainment Ass'n, Inc.* Case No. 09-0481; and oral arguments were heard on March 25, 2010. The Illinois Supreme Court upheld city and county ordinances which allowed discriminatory tax

treatment, based on content, in *Pooh-Bah Enterprises v. County of Cook*, 232 Ill.2d 463, 905 N.E. 2d 781 (Ill. 2009), *cert. denied*, 130 S.Ct. 258 (2009), though the Court there distinguished the case as not involving a tax issue, but a subsidy of the arts. Pursuant to the Tax Injunction Act, 28 U.S.C. § 1341, essentially all challenges to taxes must be brought in State Courts; and this Court is the only Federal check on such taxing powers. These developments suggest a pressing need for this Court to clarify the law governing discriminatory taxation of free expression. Without guidance from this Court, lower courts will continue to reach disparate results on this important question of constitutional law.

Licensing fees for adult businesses, however, have been upheld by Federal courts only when those fees have some relationship to the cost of regulating the businesses. The concerns expressed by the legislature here certainly do not directly relate to the cost of such regulation. In *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 710 (5th Cir. 1994) the Court upheld licensing fees for adult businesses and their employees but made it clear that it would not sustain a tax such as this one: "Government cannot tax First Amendment rights, but it can exact narrowly tailored fees to defray administrative costs of regulation. *Cox v. New Hampshire*, 312 U.S. 569, 576-77, 85 L.Ed. 1049, 61 S.Ct. 762 (1941)." In *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), a discriminatory license tax involving adult businesses was invalidated where the tax was not related to the

costs of regulating those businesses. See also *729, Inc. v. Kenton County Fiscal Court*, 151 F.3d 485 (6th Cir. 2008); and *Big Hat Books v. Blackford County Prosecutor*, 565 F. Supp. 2d 981, 994-995 (S.D. Ind. 2008) (striking $250 assessment on sale of sexually explicit materials).

This Court, in *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105 (1991), stated that: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." 502 U.S. at 115-116. The expressive activity in this case is dance; and the discrimination is against the forum used, that of an establishment which features nudity for at least 30 days during a calendar year. The burden is not restricted to the nude dancing itself, as the tax continues even if the venue changes its fare after 30 days.

In *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000) this Court struck down a Federal statute requiring cable systems to fully scramble or block channels "primarily dedicated to sexually-oriented programming" for a substantial part of each day, to avoid it being seen by children: "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." See also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253-254 (2002), this Court invalidated a Federal statute aimed at preventing child pornography: "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." The government may not prohibit speech because it increases the chances an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105 (1973) (*per curiam*).

This Court differentiated between secondary effects regulations, which require only "intermediate scrutiny", and "primary effects" regulations, which are subject to strict scrutiny, in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-868 (1997):

> And the purpose of the CDA is to protect children from the primary effects of "indecent" and "patently offensive" speech, rather than any secondary effects of such speech. Thus the CDA is a content-based blanket restriction on speech and, as such, cannot be "properly analyzed as a form of time, place and manner regulation."

The tax at issue here singles out speech for burden because of the alleged possibility that lawful speech may tend to influence the listener towards inappropriate conduct. Surely the State cannot justify this tax on the basis of any compelling State interest. Nor can it show that the statute is narrowly drawn to achieve that end, and not to unnecessarily interfere with expression. Once again from the dissent in the Utah Supreme Court:

> ¶68 The Tax is a content-based regulation. It applies solely based on the narrow content of the business activity, namely, whether it involves nudity. While the Commission argues that the Tax could be applied conceptually to any type of business, this purported expansive reach does not make it content neutral. Just the opposite is true: it applies to exotic dancing but not to traditional ballet, an art exhibit, or a theatrical performance. In short, it is the content of expression that triggers the Tax. (App. 46-47).

The statute at issue here is directed at nudity that is "accompanied by expressive activity". It does *not* purport to affect public nudity; and there is no application of the tax except to businesses which feature nudity in an expressive setting.

POINT II

THE STATUTE IS UNCONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY TEST OF *O'BRIEN*.

The standard for the application of intermediate scrutiny is *United States. v. O'Brien*, 391 U.S. 367 (1968). As the Utah Court correctly pointed out:

> ¶24 As a content-neutral regulation of conduct that imposes incidental burdens on some protected expression, the Tax is constitutional so long as it passes intermediate scrutiny under the *O'Brien* test. Under

> *O'Brien*, a regulation of conduct is constitutional and must be upheld so long as: (1) it is within the power of the legislature to enact; (2) it furthers a substantial government interest; (3) the government interest is unrelated to the suppression of protected expression; and (4) any incidental restrictions it imposes on protected expression are not greater than is essential to further the interest. (App. 19-20).

This Court there upheld a conviction of a man who burned his draft card in an act of civil disobedience. A general statute regulating behavior may *incidentally* burden expression. The Court found that the statute did not violate the First Amendment by restricting the destruction of a draft card in a symbolic act of resistance to the draft: "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment." *Id.* at 376. This Court held that the statutory scheme which required persons of draft age to register for the draft and to carry their draft cards on their person was a valid exercise of Congressional power to raise an army and to maintain the security of the country:

> The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing

> people who knowingly and wilfully destroy or mutilate them. *Id.* at 391-80. (Internal citations omitted).

In that case, however, there was a direct link between the regulation and the public purpose. That link is imperative for a law to pass intermediate scrutiny. In *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) this Court held that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."

The Utah Supreme Court dispensed with the need for such a link in its decision here; and in doing so, it failed to apply intermediate scrutiny. The State claims that money needs to be raised for sex offender therapy; but the targeted tax is unrelated to the need. The Utah Court erred in its application of *O'Brien*, because it neglected the heightened scrutiny which is required even when the effect on protected expression is "incidental". Because there is *absolutely no evidence of any connection* between the target of the tax and the evil sought to be addressed, the tax is *not* narrowly tailored as a matter of law. The challenged tax provisions fail to comport with the requirement that "any incidental restrictions it imposes on protected expression is not greater than is essential to further the interest" in several respects. Certainly the State has the power to tax and raise revenue. The need for therapy for those who have been convicted of sexual offenses is not in controversy. The statute, however, fails both the third and fourth parts of the

O'Brien test. It is not mainly a revenue raising measure. The Utah Court was simply wrong in stating: "The legislative record before us supports the conclusion that the predominant reason the Tax was enacted was to provide treatment for sex offenders, not to suppress protected expression." ¶ 19.

Under "intermediate scrutiny", the State must show some clear relationship between this tax and *proven harms*; and that the measure deals with such proven harms to a *material degree*. More direct means are easily available to deal with the need for sex therapy; and *O'Brien* scrutiny requires them to be used. This tax is punitive in its effect; and it is so without any reference to secondary effects *or any other reason* to justify its choice of targets. In fact, such a burden of a general tax on any one person, of class of persons, truly would be "de minimis", which this tax most certainly is not.

The Utah Court emphasized the difference between the *O'Brien* test and the *Renton* test used in secondary effects cases, which it stated "are two distinct tests directed at two different inquiries." (¶ 25) (App. 20). The Court said that "understanding the distinctions between the two tests is key to reaching the correct result." *Id.* The Utah Court rejected the "secondary effects" arguments relied upon by both the trial court and the State's attorneys; but did not properly differentiate between the two tests. The tests are more similar than the Court stated; and they are often intertwined. The essential difference is the nature of the problem addressed. In

the zoning cases, the constant problem is that of secondary effects. In *O'Brien* itself, the problem was avoiding disruption of the Selective Service Act and the constitutional power of Congress to wage war. Here, it is said that the problem is that of sex offenders who are not receiving therapy that is needed to avoid re-offending. The missing link is most obvious: The Court rejected the Attorney General's argument that the existence of adult entertainment businesses *causes or contributes to* that problem. (See ¶¶ 25-29) (App. 23-29). When the Court did so, it cut the tie to either the *O'Brien* test or the *Renton* "secondary effects" test. It is this link which is necessary for a statute to pass intermediate scrutiny.

In *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) this Court held that the City's claim of regulating secondary effects must have a valid basis: "the City certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects". *Id.* at 437. And it allowed an affected business to show a lack of such a link:

> This is not to say that the municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. *Id.* at 438.

The link between the regulation and "secondary effects" in the *Renton* line of cases is exactly the same as the link that is required under *O'Brien*. The regulation under *O'Brien* must be "narrowly tailored"

(*Bushco* ¶ 38; App. 31) to deal with a problem that is connected with the solution. The legislature took pains to add into the record concerns about "paraphilias" to provide some tenuous link between the target of the tax and the need for more money to deal with sex offender therapy. But the Court did not mention any such link. There is no authority whatsoever for taxing adult businesses because of the general need for sex therapy.

This Court, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) again discussed "secondary effects" and the *O'Brien* test, making no differentiation in the targets of the two tests. Justice O'Connor, writing for the majority (on this point) referred to the ordinances as one designed to deal with such effects:

> In other words, the Government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance that O'Brien sought to convey by burning his draft card. So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. Put another way, *the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the*

> *secondary effects, such as the impacts on public health, safety, and welfare*, which we have previously recognized are "caused by the presence of even one such" establishment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50 (1986); see also *Boos v. Barry*, 485 U.S. 312, 321 (1988).

529 U.S. at 291. (Emphasis added).

It is well established that there must be a reasonable relation between perceived evils (whether they be secondary effects or disruption of the war effort) and the remedy applied by the government. See also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (n. 20). As observed by the Utah dissent:

> ¶75 Because the Tax regulates expression "based on its content, it must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). The Commission, however, argues that the Tax's constitutionality should be evaluated under intermediate scrutiny because it regulates based on negative secondary effects. However, the doctrine of secondary effects does not apply. The sole secondary effect the Commission identifies is sex offenses. This effect, however, lacks any empirical, reasonable connection to the viewing of nudity, which consequently makes the Tax a reaction to a primary effect. (App. 50).

The Utah Court seemed to say that choosing nudity in a commercial setting as the target of a

narrow-based tax, which almost certainly will raise very little money, required no justification. The requirement, however, of narrow tailoring, does indeed require a link between the regulation and the problem; and this link is not present.

CONCLUSION

This case contains important issues regarding taxation and the First Amendment. Moreover, the issues have recently been litigated in several forums; and there is a movement towards similar taxes in various States, which requires clear guidelines from this Court. This is a content-based tax which is not imposed as a consequence of "secondary effects". Instead, it is directed towards alleged "primary effects", including the effect it may have on those who might be, or might become, sex offenders. Such a tax should be subject to strict scrutiny. Because all challenges to such taxes must be brought in State courts; and because such scrutiny is less likely to be applied by State courts, litigation will certainly multiply without further guidance.

RESPECTFULLY SUBMITTED this 25th day of May, 2010.

W. ANDREW MCCULLOUGH, L.L.C.

W. ANDREW MCCULLOUGH
Attorney for Petitioners

2009 UT 73

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT
OF THE STATE OF UTAH

– – – – ooOoo – – – –

Bushco, dba Babydolls Escorts; Valley Recreation, Inc. dba Kitty's Escorts and Angel's Escorts; The D. House, LLC dba The Doll House,

Plaintiffs and Appellants,

v.

Utah State Tax Commission; Pam Hendrickson, R. Bruce Johnson, D'Arcy Dixon Pignanelli, and Mark B. Johnson (in their official capacities as members of the Utah State Tax Commission),

Defendants and Appellees.

No. 20070559

FILED
November 20, 2009

– – –

Third District, Salt Lake
The Honorable Tyrone E. Medley
No. 040911691

Attorneys: W. Andrew McCullough, Midvale, for plaintiffs
Susan L. Barnum, Nancy L. Kemp, Salt Lake City, for defendant Utah State Tax Commission
Nancy L. Kemp, Salt Lake City, for defendants Pam Hendrickson, R. Bruce Johnson, D'Arcy Dixon Pignanelli, and Mark B. Johnson
Marina Baginsky Lowe, Salt Lake City, for amicus curiae ACLU Foundation of Utah

– – –

DURRANT, Associate Chief Justice:

INTRODUCTION

¶ 1 In 2004, the Utah legislature enacted the Sexually Explicit Business and Escort Service Tax[1] (the "Tax"), which imposes a 10 percent gross receipts tax on businesses whose employees or independent contractors (1) perform services while nude or partially nude for 30 days or more per year, or (2) provide companionship to another individual in exchange for compensation. The revenue generated by the Tax helps fund treatment programs for convicted sex offenders and investigations of internet crimes against children.

---

[1] Utah Code Ann. §§ 59-27-101 to -108 (2008).

¶ 2 Plaintiffs, a group of escort service agencies and erotic dancing clubs, challenge the Tax as a violation of their First Amendment rights under the United States Constitution. We hold that the statutory provisions imposing the Tax on businesses whose employees provide services while nude are constitutional as a content-neutral regulation of conduct that imposes de minimis burdens on protected expression. However, we conclude that the provisions applying the Tax to escort services are unconstitutionally vague.

BACKGROUND

¶ 3 The Tax creates a mechanism for taxing businesses in which individuals perform services while nude or partially nude. Specifically, "[a] tax is imposed on a sexually explicit business equal to 10% of amounts paid to or charged by the sexually explicit business for . . . (a) an admission fee; (b) a user fee; (c) a retail sale of tangible personal property made within the state; (d) a sale of . . . food . . . ; (e) a sale of beverage; and (f) any service."[2] A sexually explicit business is defined as any business where a "nude or partially denuded" employee or contractor "performs any service: (a) personally on the premises of the sexually explicit business; (b) during at least 30 consecutive or nonconsecutive days within a calendar

---

[2] *Id.* § 59-27-103.

year" and is paid or compensated for such service.[3] To be "nude or partially denuded" means that "any of the following [is] less than completely and opaquely covered: (a) genitals; (b) the pubic region; or (c) a female breast below a point immediately above the top of the areola."[4]

¶ 4 The statute also provides for a tax on escort services. An escort service is "any person who furnishes or arranges for an escort to accompany another individual for: (a) companionship; and [for:] (b)(i) a salary; (ii) a fee; (iii) a commission; (iv) hire; (v) profit; or (vi) any amount similar to an amount listed in this Subsection 2(b)."[5] An escort is "any individual who is available to the public for the purpose of accompanying another individual" for compensated companionship.[6] "[A] tax is imposed on an escort service equal to 10% of amounts paid or charged by the escort service for any transaction that involves providing an escort to another individual."[7]

¶ 5 The proceeds from the Tax are to be split between the Department of Corrections, Adult Probation and Parole Division, and the Attorney General's office.[8] Specifically, portions of the proceeds are

---

[3] *Id.* § 59-27-102(4).

[4] *Id.* § 59-27-102(3).

[5] *Id.* § 59-27-102(2).

[6] *Id.* § 59-27-102(1).

[7] *Id.* § 59-27-103(2).

[8] *Id.* § 59-27-105(4).

dedicated to "provide treatment services" to individuals convicted of sex offenses, including indigent or nonworking adults, other individuals who are subject to Adult Probation and Parole jurisdiction, and juveniles.[9] A portion of the fund is also designated for a task force that "investigates and prosecutes individuals who use the Internet to commit crimes against children."[10]

¶ 6 Plaintiffs, a group of escort service agencies and erotic dancing clubs, initiated this action against the Utah State Tax Commission (the "Commission") in 2004 by filing a complaint seeking (1) a declaratory judgment that the Tax was an unconstitutional burden on both their right to freedom of speech guaranteed by the First Amendment and their right to equal protection guaranteed by the Fourteenth Amendment; and (2) a permanent injunction against enforcement and collection of the Tax. Both parties moved for summary judgment. The district court granted the Commission's motion for summary judgment while denying Plaintiffs' motion. Specifically, the district court held that the Tax did not violate Plaintiffs' First Amendment rights because it was constitutional under *United States v. O'Brien*.[11] The court also found that the Tax did not violate the Equal Protection Clause of the Fourteenth Amendment because the

---

[9] *Id.*

[10] *Id.* § 59-27-105(4)(e).

[11] 391 U.S. 367 (1968).

Tax was rationally related to the legitimate government interest in providing treatment for sex offenders.[12]

¶ 7 Plaintiffs timely appealed the district court's grant of summary judgment to this court. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(j) (2008).

STANDARD OF REVIEW

We review a grant of summary judgment for correctness, according no deference to the district court's decision.[13] The district court's determination that the Tax is constitutional is also a legal conclusion that we review for correctness.[14]

---

[12] Plaintiffs have not pursued their equal protection argument on appeal.

[13] *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1111-12 (Utah 1991).

[14] *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 17, 73 P.3d 325 ("[B]ecause interpreting the . . . Constitution presents a question of law, we review the trial court's determination for correctness and give no deference to its legal conclusions."); *see also Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 7, 67 P.3d 436 ("The issue of whether a statute is constitutional is a question of law, which we review for correctness, giving no deference to the trial court." (citation and internal quotations marks omitted)).

ANALYSIS

¶ 8 In 1994, the city of Erie, Pennsylvania passed an ordinance making public nudity a criminal offense.[15] While the ordinance was a simple, generally applicable prohibition of public nudity on its face, it contained a preamble expressly acknowledging that the ordinance was adopted "for the purpose of limiting a recent increase in nude live entertainment within the City."[16] Additionally, Erie's city attorney stated that the ordinance "was not intended to apply to 'legitimate' theater productions."[17]

¶ 9 When the ordinance was challenged by nude dancing clubs as an unconstitutional burden on their First Amendment right to engage in erotic nude dancing, the United States Supreme Court upheld the ordinance, concluding that its predominant purpose was to advance the city's interest in limiting negative secondary effects – an interest unrelated to the substantive content of nude dancing expression.[18]

¶ 10 The similarities between this case and *Erie* are substantial and important. Like the *Erie* ordinance, the Tax is both generally applicable and neutral as to message. Also like the *Erie* ordinance,

---

[15] *Pap's A.M. v. City of Erie*, 719 A.2d 273, 275 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000).

[16] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (internal quotation marks omitted).

[17] *Id.* at 292.

[18] *Id.* at 296, 302.

the Tax was enacted, according to the record before us, with the predominant purpose of serving an important state interest unrelated to the substantive content of protected expression. The Tax is also similar to the ordinance in *Erie* in that it places only de minimis burdens on erotic nude dancing, a type of expression lying "only within the outer ambit of the First Amendment's protection"[19] and "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate."[20] The Tax is distinguishable from the ordinance upheld in *Erie* only in its form and in the fact that the Tax is, in all respects, less broad and less burdensome than the *Erie* ordinance.

¶ 11 We begin our analysis by evaluating the Tax's content neutrality and then assess whether it passes constitutional muster under the appropriate level of scrutiny. We determine that it does. We next turn to the question of whether the Tax is unconstitutionally overbroad and determine that it is not. We finish by analyzing whether the statutory provisions applying the Tax to escort services are unconstitutionally vague and conclude that they are.

---

[19] *Id.* at 289.

[20] *Id.* at 294.

I. THE TAX IS CONTENT NEUTRAL BECAUSE ITS APPLICATION IS TRIGGERED SOLELY BY CONDUCT, AND THE RECORD DOES NOT ESTABLISH THAT IT WAS ENACTED WITH THE PREDOMINANT PURPOSE OF SUPPRESSING PROTECTED EXPRESSION

¶ 12 A regulation of speech or expressive conduct is content neutral so long as the government interest underlying the regulation is not related to the suppression of protected expression.[21] A statute is "unrelated to the suppression of expression," and therefore content neutral, so long as it is both facially neutral[22] and does not have the "predominant" purpose of suppressing protected expression.[23]

---

[21] *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (internal citation omitted)).

[22] *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) ("[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.").

[23] *See, e.g., City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 49 (1986) (noting that a finding that a statute's "predominant intent" was to limit negative secondary effects was "more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free

(Continued on following page)

¶ 13 Plaintiffs' contention that the Tax is an unconstitutional burden on their First Amendment rights is based primarily upon their assertion that the Tax is content based. We disagree and conclude that the Tax is facially neutral because its application is triggered without reference to the content of any protected expression. Additionally, the record before us does not establish that the Tax was enacted with the predominant purpose of suppressing protected expression.

A. The Tax Regulates Nudity, Rather Than Nude Dancing, and Is Therefore Facially Content Neutral

¶ 14 The starting point for analysis of a regulation that impacts expressive conduct is the Supreme Court's decision in *United States v. O'Brien*, where the Court rejected the proposition that a "limitless variety of conduct" qualifies as speech simply because it is potentially expressive.[24] Because

---

expression"); *see also Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 646 (1994) ("[E]ven a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.").

[24] 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991) ("It can be argued, of course, that almost limitless types of conduct – including appearing in the nude in public – are 'expressive,' and in one sense of the word this is true. People who go about in the nude in public may be expressing

(Continued on following page)

all conduct is potentially expressive, holding that each law regulating conduct implicates the First Amendment would largely eviscerate the distinction between conduct and speech.

¶ 15 Instead, the Court has recognized that regulations of conduct, so long as the conduct is not inherently expressive, should be treated as content neutral if the regulations are neutral as to message.[25] This is so because, in order to be content based, a regulation must classify based on the content of protected expression. A regulation that classifies based on unprotected conduct by definition does not classify based on protected expression and therefore is not content based. While regulations of unprotected conduct are still subject to First Amendment scrutiny when they burden protected expression,[26] they are scrutinized at a lower level since the concerns that prompt strict scrutiny are absent when conduct, rather than speech, is the triggering factor.[27]

---

something about themselves by so doing. But the court rejected this expansive notion of 'expressive conduct' in *O'Brien*. . . .").

[25] *See Schultz v. City of Cumberland*, 228 F.3d 831, 840-41 (7th Cir. 2000); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (noting that nudity is not "an inherently expressive condition" and finding a public nudity ordinance content neutral).

[26] *See, e.g., O'Brien*, 391 U.S. at 376-77; *see also Erie*, 529 U.S. at 289.

[27] *Turner Broad. Sys.*, 512 U.S. at 641-42 ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the

(Continued on following page)

¶ 16 In this case, application of the Tax is triggered by nudity, which the Supreme Court has specifically declared "is not an inherently expressive condition."[28] Because it is not inherently expressive, nudity is unprotected conduct rather than protected expression. Accordingly, in *Erie*, the Court "clarif[ied] that government restrictions on public nudity . . . should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech."[29] The Court rejected the argument that a ban on nudity was necessarily a ban on the message conveyed, distinguishing nudity as a means of expression rather than protected expression itself.[30]

---

content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." (internal citations omitted)).

[28] *Erie*, 529 U.S. at 289.

[29] *Id.*

[30] *Id.* at 292-93 ("The public nudity ban certainly has the effect of limiting one particular means of expressing the kind of erotic message being disseminated at Kandyland. But simply to define what is being banned as the 'message' is to assume the conclusion. . . . Although there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here."); *see also Barnes*, 501 U.S. at 571 ("[W]hile the dancing to which [the

(Continued on following page)

¶ 17 Facially, at least in terms of the content-neutrality analysis, the Tax is indistinguishable from the public nudity ordinance upheld in *Erie*. Like that ordinance, the Tax regulates the condition of nudity – not just specific instances of protected expression, like nude dancing.[31] Also like the *Erie* ordinance, the Tax applies or does not apply without reference to either protected expression or any particular message. The Tax simply cannot be facially content based because its trigger – nudity – is not "content" since it is not protected expression. On its face, therefore, the Tax is *conduct based,* rather than *content based,* and as such is facially content neutral.

---

ordinance] was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.").

[31] The tax applies to all businesses "at which any nude or partially denuded individual . . . performs any service . . . personally on the premises . . . during at least 30 consecutive or nonconsecutive days within a calendar year. . . ." Utah Code Ann. § 59-27-102(4) (2008). It does not differentiate between strip clubs and theaters or between escort services and artistic modeling agencies. The tax applies equally to all businesses providing nude services for the requisite period of time.

B. The Tax Is Also Content Neutral Because the Record Does Not Support Plaintiffs' Allegations That the Legislature's Predominant Purpose in Enacting the Tax Was to Suppress Protected Expression

¶ 18 Because the Tax is facially neutral, we must conclude that it is content neutral unless there is other evidence in the record establishing that the Tax, although neutral on its face, is predominantly a covert attempt to suppress protected expression.[32] While facial neutrality will not save a statute enacted with the predominant purpose of suppressing the expression of particular viewpoints or the discussion of certain subjects, the Supreme Court has repeatedly declined to infer an intent to suppress protected expression on the "basis of an alleged illicit motive."[33] There must be actual evidence in the record establishing that suppression of protected expression was the statute's predominant purpose.[34]

---

[32] *Turner Broad. Sys.*, 512 U.S. at 645 ("Our cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys."); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 781-91 (1989) ("The principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

[33] *See e.g., Erie*, 529 U.S. at 292.

[34] *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986); *see also Erie*, 529 U.S. at 291-92.

¶ 19 We find nothing in the record before us – either the Tax's legislative history or in the text of the Tax itself – establishing that the Tax was enacted with the predominant purpose of suppressing protected expression. While some individual legislators did express concern regarding whether the Tax was intended to target nude dancing clubs,[35] the legislative history does not establish that this was the Tax's predominant purpose. In fact, the Tax's sponsors consistently emphasized that the Tax was designed as a means to provide treatment for sex offenders.[36] As noted by the Supreme Court in

---

[35] *See, e.g.*, Hearing on H.B. 239 Before the H. Revenue & Taxation Standing Comm. (Feb. 3, 2004) (statement of Rep. Morgan Philpot) ("Why don't we take a stand whether it be through some form of task force that looks at this or just a bill that says this should be illegal? Because isn't that what we're really driving at here? . . . We're basically saying these are social ills. They're wrong. But we're not actually coming out and saying we're making it so, and is it because of the constitutional nature of that challenge . . . ?"); Senate Floor Debate, H.B. 239, 55th Utah Leg., Gen. Sess. (March 2, 2004) (statement of Sen. Mike Dmitrich) ("[T]his is a case where we're trying to put these businesses out of business.").

[36] *See, e.g.*, Hearing on H.B. 239 Before the H. Revenue & Taxation Standing Comm. (Feb. 3, 2004) (statement of Rep. Duane Bordeaux) ("I think, you know, to answer your question and to be very direct, well when you talk about the [moral] argument and are we trying to drive these out of business. They can open up ten more of these businesses, that's not my [mindset] here. Truly, the treatment side of it, I do think there's a contributing aspect of it that they can help pay. It's not to drive them out of business. . . ."); Senate Floor Debate, H.B. 239, 55th Utah Leg., Gen. Sess. (March 2, 2004) (statement of Sen. Howard Stephenson) ("We're not moralizing here in passing this

(Continued on following page)

O'Brien, in cases where a facially neutral statute is alleged to be content based because of statements found in the statute's legislative history, the reviewing court should be cautious in ascribing an impermissible motive to the enacting legislature:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is an entirely different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.[37]

The legislative record before us supports the conclusion that the predominant reason the Tax was

---

tax. We're not trying to even reduce these [businesses'] income. What we're attempting to do is fund the secondary effects that are associated with these kinds of businesses and these kinds of activities.").

[37] *O'Brien*, 391 U.S. at 383-84.

enacted was to provide treatment for sex offenders, not to suppress protected expression.

¶ 20 Additionally, there is nothing in the text or structure of the Tax itself establishing that the legislature's predominant purpose in enacting the Tax was to suppress erotic nude dancing. The Tax is generally applicable; it applies to every business that employs nudity more than 30 days during the calendar year, regardless of whether that business employs nudity to convey an expressive message – erotic or otherwise.[38] Even if the burdens of the Tax, in practical effect, are likely to fall disproportionately on nude dancing clubs, the Tax is, in that regard, no different than the ordinance upheld in *Erie*. The major impact of the public nudity ordinance upheld in *Erie* surely fell upon businesses that employed nudity during their regular course of business. Yet this likely disparate impact was insufficient to render the ordinance content based.[39]

¶ 21 The only provision in the Tax that could be viewed as supporting the conclusion that the Tax was enacted with an intent to suppress erotic nude dancing is the 30-day exemption period.[40] One might

---

[38] Utah Code Ann. § 59-27-102(4) (2008).

[39] *Erie*, 529 U.S. at 296.

[40] Utah Code Ann. § 59-27-102(4) (2008) (defining a sexually oriented business as one "at which any nude or partially denuded individual . . . performs any service . . . during at least 30 consecutive or nonconsecutive days within a calendar year").

view this exemption as evidence that the legislature intended to target nude dancing clubs – which are likely to feature erotic nude dancing on a consistent basis year round – over other businesses, such as theaters, that feature nudity only on an irregular basis. But this is only one interpretation of the purpose of the provision. One could also view the 30-day exemption period as an attempt to balance the state interest in providing sex offender treatment against the incidental burdens imposed on protected expression.[41]

¶ 22 Regardless of whether an intent to suppress protected expression can be inferred from the 30-day exemption period, any such inference is certainly less strong than the express statement found in the preamble of the *Erie* ordinance, which noted that the ordinance was prompted by concerns about an increase in nude live entertainment within the city.[42] The existence of this express statement in the

---

[41] Contrary to the dissent's assertion, we have not construed the 30-day exemption as a balancing of interests. We only note that this is a legitimate view of the legislative purpose. And in light of this fact, we simply do not agree with the dissent's conclusion that the 30-day exemption establishes that the Tax's predominant purpose was the suppression of protected expression.

[42] *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000). The dissent distinguishes this case from *Erie* based on the fact that the 30-day exemption is found in the Tax's text rather than in the preamble. But this is a distinction without a difference in the context of determining whether the Tax is content based. A statute is content based if it

(Continued on following page)

text of the *Erie* ordinance itself was an insufficient basis for the Supreme Court to conclude that the ordinance was content based.[43]

¶ 23 In light of the Supreme Court's treatment of the analogous issue in *Erie,* the mere possibility that *a purpose* of the Tax was to target nude dancing clubs is insufficient to render the Tax content based. The record before us indicates that the Tax's *predominant purpose* was providing treatment for sex offenders, not the suppression of protected expression. Because the Tax is facially content neutral and the record does not establish that the legislature enacted it with the predominant purpose of suppressing protected expression, it is a content-neutral regulation of speech that we analyze under the intermediate scrutiny test set out in *O'Brien.*

II. THE TAX PASSES INTERMEDIATE SCRUTINY UNDER *O'BRIEN*

¶ 24 As a content-neutral regulation of conduct that imposes incidental burdens on some protected expression, the Tax is constitutional so long as it passes intermediate scrutiny under the *O'Brien* test. Under *O'Brien,* a regulation of conduct is constitutional and must be upheld so long as: (1) it is within

---

was enacted with the predominant purpose of suppressing protected expression. Such a purpose may be divined from a preamble just as readily as from a statute's text.

[43] *Erie,* 529 U.S. at 290-92.

the power of the legislature to enact; (2) it furthers a substantial government interest; (3) the government interest is unrelated to the suppression of protected expression; and (4) any incidental restrictions it imposes on protected expression are not greater than is essential to further the interest.[44]

¶ 25 As a threshold matter, it is important to differentiate between the *O'Brien* test for a regulation of conduct that imposes incidental burdens on some protected expression and the test for a regulation of speech that targets secondary effects.[45] Although both tests can be employed in situations that are factually similar,[46] they are two distinct tests directed at two different inquiries. The *O'Brien* incidental burdens test applies to regulations of conduct that are content neutral both on their face and as to purpose. The *Renton* secondary effects analysis applies to regulations of speech that are content based on their face but are asserted to be content neutral as to purpose. And, in a case like this one, where the parties' arguments implicate both *O'Brien* and the secondary

---

[44] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[45] *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

[46] *See, e.g., Erie*, 529 U.S. 277 (2000) (employing *O'Brien's* incidental burdens analysis); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (employing secondary effects analysis).

effects analyses, understanding the distinctions between the tests is key to reaching the correct result.

¶ 26 As set forth by the Supreme Court, the intermediate scrutiny test from *O'Brien* applies when the regulation at issue regulates *conduct*, but the "course of conduct" to which the regulation applies contains both "'speech' and 'nonspeech' elements."[47] In other words, the *O'Brien* test applies to statutes that regulate conduct but that include within their reach both expressive and nonexpressive conduct. The *O'Brien* inquiry is directed toward determining whether "a sufficiently important governmental interest in regulating [conduct] can justify incidental limitations on First Amendment freedoms."[48]

¶ 27 The secondary effects analysis, on the other hand, is appropriate when the regulation at issue is content based, i.e. is directed at *speech* rather than conduct, but is justified with reference to the secondary effects associated with the speech rather than the communicative content of the speech itself.[49]

---

[47] *O'Brien*, 391 U.S. at 376.

[48] *Id.*

[49] *See Alameda Books*, 535 U.S. at 440-41 (noting that the purposes of the secondary effects analysis are to "require [] courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech]' . . . [and to] ask whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." (quoting *Renton*, 475

(Continued on following page)

¶ 28 The difference in objectives between the incidental burdens and secondary effects analyses is readily apparent. Whereas the *O'Brien* incidental burdens test is designed simply to ensure that a neutral, nontargeted regulation of conduct does not place impermissibly heavy burdens on protected expression, the inquiry in secondary effects cases is directed, at least in part, toward assessing the motive behind a facially content-based regulation of speech. When a law, on its face, regulates protected expression differently based on its content, there is a presumption that the law's purpose is to target certain speech based on its content or communicative impact.[50] In such a case, the reviewing court employs the secondary effects analysis to ensure that the expressed interest in regulating secondary effects is the

---

U.S. at 47)); *see also R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 407 (7th Cir. 2004) ("Whatever the label, *Renton's* second step is best conceived as an inquiry into the purpose behind an ordinance rather than an evaluation of an ordinance's form.").

[50] *Schultz v. City of Cumberland*, 228 F.3d 831, 840 (7th Cir. 2000) ("Content-based regulations by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed. Since it is the content of the speech that determines whether it is within or without the [regulation], they single out certain viewpoints or subject matter for differential treatment. These regulations draw strict scrutiny because their purpose is typically related to the suppression of free expression and thus contrary to the First Amendment imperative against government discrimination based on viewpoint or subject matter." (alteration in original) (citations and internal quotation marks omitted)).

real motivation behind the challenged statute.[51] In contrast, there is no need, when applying the incidental burdens analysis, to evaluate the expressed interest because the determination that the regulation does not target the content of protected expression has already been made – by virtue of declaring the regulation content neutral.

¶ 29 Having set out the distinct purposes of the *O'Brien* incidental burdens analysis and the secondary effects analysis, and having determined that *O'Brien* provides the correct framework of analysis, we now analyze whether the Tax passes intermediate scrutiny under *O'Brien*.

A. The Tax Is Within the Legislature's Power to Enact

¶ 30 The Tax satisfies the first prong of the *O'Brien* analysis because it is beyond question that the legislature has the authority to enact a tax to raise revenue. The Utah State Constitution expressly grants the legislature plenary authority over taxation.[52] Thus, the Tax is within the power of the legislature to enact and meets the first prong of the *O'Brien* test.

---

[51] *Alameda Books*, 535 U.S. at 440-41.

[52] Utah Const. art. XIII, § 4, cl. 1.

B. The Tax Furthers the Substantial State Interest of Providing Treatment for Sex Offenders and Thereby Preventing Future Offenses

¶ 31 As to the second prong, we conclude that the Tax furthers a substantial government interest. While Plaintiffs acknowledge that providing treatment for sex offenders is an important government interest, they claim that the Tax fails to satisfy the second prong of the *O'Brien* test for two reasons: (1) there is not sufficient evidence supporting a connection between nude dancing establishments and sex offenders; and even if a sufficient connection did exist, (2) the Tax impermissibly attempts to address the "primary," rather than "secondary," effects of nude dancing.

¶ 32 Plaintiffs' objections regarding the lack of evidentiary connection are misplaced because they are based on the requirements of the secondary effects test rather than the *O'Brien* test. While Plaintiffs are correct in noting that the Supreme Court, in construing the "substantial state interest" prong under *Renton* and its other secondary effects cases, has required parties seeking to justify a regulation of speech under the secondary effects doctrine to establish some level of evidentiary connection between the secondary effects a regulation targets and the speech

it regulates, no similar burden of proof exists under the *O'Brien* test.[53]

¶ 33 As set forth above, the evidentiary connection requirement for secondary effects regulations exists to provide assurance that the regulation was actually motivated by the asserted concerns over secondary effects rather than by the content of the speech itself. A review of the relevant case law shows that the second prong of the *O'Brien* test does not require that the state provide evidentiary proof of a connection between the speech it regulates and

---

[53] *Compare Alameda Books*, 535 U.S. at 437 ("[T]he city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects. . . .") *with Erie*, 529 U.S. at 298-99 ("Finally, it is worth repeating that Erie's ordinance is on its face a content neutral restriction that regulates conduct, not First Amendment expression. . . . On this point, *O'Brien* is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction and mutilation of draft cards. . . . There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests. But the Court permitted Congress to take official notice, as it were, that draft card destruction would jeopardize the system. The fact that this sort of leeway is appropriate in a case involving conduct says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. As we have said, so long as the regulation is unrelated to the suppression of expression, the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." (internal citation and quotation marks omitted)).

secondary effects.[54] Instead, all that is required is that the state show its regulation would advance a substantial state interest. The requirement that the interest be "substantial" simply ensures that the state's interest in adopting the legislation is sufficiently weighty to justify the incidental burdens that the regulation may place on some protected expression.[55]

¶ 34 Plaintiffs' arguments relating to primary effects are misplaced for a similar reason. The primary effects of speech are the direct impacts that the speech has upon the listener or viewer – such as a change in attitude or an increased motivation to engage in certain behavior. The secondary effects of speech, on the other hand, are indirect effects associated with the speech. Secondary effects do not operate on the listener but on something else, such as the neighborhood surrounding the location where the speech occurs.[56] Plaintiffs contend that the Tax should be subject to strict scrutiny because the State has

---

[54] *See, e.g., Erie*, 529 U.S. at 298-99.

[55] *O'Brien*, 391 U.S. at 376.

[56] *Alameda Books*, 535 U.S. at 444 (Kennedy, J., concurring) ("Speech can produce tangible consequences: It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.").

failed to justify the Tax by reference to secondary effects. Plaintiffs claim that the State has offered only the argument that people who view erotic nude dancing are more likely to commit sex offenses. Plaintiffs contend that, even if the State's assertion is true, such an effect is a primary, rather than secondary, effect of erotic nude dancing since it operates, if at all, through the impact that watching erotic nude dancing has on the viewer. Plaintiffs' argument is wholly misplaced because the distinction between primary and secondary effects of speech is only relevant when a court is evaluating the constitutionality of a content-based regulation of speech. The *O'Brien* analysis assumes the evaluated regulation will impose some burden on protected expression, which inevitably results in a burden on the primary effects of that protected expression. The whole point of the *O'Brien* analysis is to determine whether that burden is acceptable in light of the government's asserted interest in enacting the regulation. Thus, even assuming that Plaintiffs' distinction regarding primary and secondary effects is correct, this fact is irrelevant in the context of a content-neutral regulation of conduct, like the Tax, that is reviewed under *O'Brien*.

¶ 35 Finally, the mere fact that the State has referenced secondary effects as a justification for its conduct-based Tax does not convert the Tax from a content-neutral regulation of conduct into a content-based regulation of speech. In his *Erie* dissent, Justice Stevens argued that, where a government

seeks to justify a regulation of conduct based, in part, on secondary effects, the regulation should be treated as a content-based regulation of speech and subjected to the secondary effects analysis:

> The Court cannot have its cake and eat it too – either Erie's ordinance was not aimed at speech and the Court may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the Court can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.[57]

The plurality rejected Justice Stevens's argument, noting that

> While the doctrinal theories behind "incidental burdens" and "secondary effects" are, of course, not identical, there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity – nude erotic dancing – is

---

[57] *Erie*, 529 U.S. at 326 (Stevens, J., dissenting).

> particularly problematic because it produces harmful secondary effects.[58]

In other words, the mere fact that, in debating the Tax, legislators referenced concerns with the secondary effects associated with nudity in business does not necessarily mean – without more – that the Tax constitutes a content-based regulation of speech that must be justified either under the secondary effects doctrine or traditional strict scrutiny. The key consideration is whether the statute seeks to suppress *speech* or regulate *conduct* – not whether concerns about secondary effects played some motivational role in its enactment.

¶ 36 In this case, the record supports the conclusion that the Tax is directed toward the substantial state interest of providing treatment for sex offenders, with the twin goals of rehabilitation and prevention of future offenses. It is also clear that the Tax furthers that interest by raising revenue that is specifically directed toward sex offender treatment programs.[59] Because the Tax furthers a substantial state interest,[60] we conclude that it satisfies the second prong of the *O'Brien* test.

---

[58] *Id.* at 295.

[59] The Tax specifically applies a portion of the revenue raised to treatment of sex offenders through the Department of Corrections. *See* Utah Code Ann. § 59-27-105 (2008).

[60] Plaintiffs point out that the tax may not *substantially further* the interest in treating sex offenders, but this is not the requirement. *O'Brien* only requires that a content-neutral

(Continued on following page)

C. Providing Treatment for Sex Offenders Is a Government Interest Unrelated to the Suppression of Protected Expression

¶ 37 The Tax also satisfies the third prong of the *O'Brien* test – the requirement that the government interest be unrelated to the suppression of protected expression. Under Supreme Court case law, it is clear that a regulation satisfies this prong of *O'Brien* so long as its predominant purpose is not the suppression of protected expression.[61] The record before us supports the conclusion that the predominant government interest precipitating passage of the Tax was the need to provide treatment for sex offenders. This interest is unrelated to any attempt to suppress speech; indeed, as set out above, any impacts on protected speech are incidental burdens associated with the Tax's application to a general class of conduct.

---

regulation of conduct *further* the state's substantial interest. *Erie*, 529 U.S. at 301 ("To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects."). The Tax would clearly do that here, even if the actual amount of revenue raised is small.

[61] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986) (noting that a determination that a statute's "'predominate'" intent was to limit negative secondary effects was "more than adequate to establish" that the government's interest was "unrelated to the suppression of free expression"); *see also Erie*, 529 U.S. at 292.

D. The Tax Is Narrowly Tailored Because It Leaves Open Alternative Means of Conveying the Erotic Message and Any Burdens It Places on Speech Are De Minimis

¶ 38 Finally, the Tax satisfies the fourth prong of the *O'Brien* test as well, in that the burdens that the Tax places on protected expression are no greater than necessary. Although the Supreme Court's use of the "no greater than necessary" language in *O'Brien* appears similar to the "least restrictive means" requirement for strict scrutiny, the Court has made clear that this prong does not require the state to show that its chosen means for advancing the substantial state interest is the least restrictive means available.[62] Instead, the fourth prong of the *O'Brien* test imposes only a requirement that the regulation be "narrowly tailored," in the sense that it "promote[ ] a substantial government interest that would be achieved less effectively absent the regulation."[63] De minimis impacts on protected speech are permissible.[64]

---

[62] *Erie*, 529 U.S. at 301 ("In any event, since this is a content-neutral restriction, least restrictive means analysis is not required."); *see also Ward v Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) (stating that "least-restrictive-alternative analysis is wholly out of place" when evaluating content-neutral regulations of speech).

[63] *United States v. Albertini*, 472 U.S. 675, 689 (1985).

[64] *Erie*, 529 U.S. at 301.

¶ 39 Plaintiffs argue that the Tax fails this prong because there are less burdensome ways of addressing the state's interest in providing treatment for sex offenders and that the First Amendment requires that these methods, rather than the Tax, be used.

¶ 40 To begin with, Plaintiffs' argument suggests that *O'Brien* requires a regulation of conduct placing incidental burdens on some protected expression to use the least restrictive means available to serve the state's asserted interest. The Supreme Court has expressly rejected that formulation of the *O'Brien* test.[65] Additionally, Plaintiffs' least restrictive means argument is contrary to its own position that a general tax – one that burdens all businesses – would satisfy First Amendment scrutiny under *O'Brien*. A generalized tax would no doubt inflict burdens on a greater variety of protected expression than the Tax at issue here, and therefore would not be the least restrictive means available. The Supreme Court's cases have made clear that the fourth prong of *O'Brien* is satisfied so long as a content-neutral regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[66] Further, de minimis impacts on protected expression are permissible.[67]

---

[65] *Id.*

[66] *Albertini*, 472 U.S. at 689.

[67] *Erie*, 529 U.S. at 301.

¶ 41 In this case, the Tax promotes the interest in providing treatment for sex offenders by raising revenue and directing that revenue towards treatment programs. While there may be other, less speech-restrictive means of accomplishing the interest, the Tax is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech."[68] "The validity of [content neutral regulations of conduct] does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests."[69]

¶ 42 Additionally, any burdens the Tax imposes on protected expression are de minimis. Indeed, the Tax burdens protected expression substantially less than the public nudity ordinance upheld by the Supreme Court in *Erie*. The *Erie* ordinance imposed a blanket ban on nudity in public. The Supreme Court noted that the public nudity ban's burden on nude dancing was de minimis, since all the dancers had to do to avoid the ban was to wear G-strings and pasties.[70] The ordinance left nude dancers "ample capacity to convey [their] erotic message"[71] and only

---

[68] *Albertini*, 472 U.S. at 689.

[69] *Id.*

[70] *Erie*, 529 U.S. at 301.

[71] *Id.*

limited whatever expression that might occur "when the last stitch is dropped."[72]

¶ 43 Plaintiffs can avoid the Tax, just like the businesses in *Erie* could avoid the ordinance, simply by having their erotic dancers use G-strings and pasties. Additionally, the Tax places less of a burden on protected expression than the ordinance upheld in *Erie* in two ways. First, in contrast to the *Erie* ordinance, which banned all public nudity under threat of *criminal* sanctions,[73] the Tax neither prohibits public nudity nor imposes criminal penalties – it simply imposes an additional cost on the commercial use of nudity as a method of expression. Secondly, the 30-day exemption period further limits the Tax's burden on protected expression. The exemption period allows businesses to use nudity as a means of expression for up to 30 days each calendar year without being subject to the Tax. Since the Tax's impact on protected expression is even less burdensome than the impact of the public nudity ordinance upheld in *Erie*, we determine that the Tax satisfies the "narrow tailoring" prong of the *O'Brien* test.

¶ 44 We are unpersuaded by Plaintiffs' citation to cases such as *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*[74] and *Arkansas*

---

[72] *Id.* at 294.

[73] *Pap's A.M. v. City of Erie*, 719 A.2d 273, 275-76 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000).

[74] 460 U.S. 575 (1983).

Writers' Project, Inc. v. Ragland[75] for the proposition that First Amendment rights may not be taxed. To begin with, as set out above, the Tax is, on its face, a regulation of conduct. The Tax is thus meaningfully distinguishable from those struck down in *Minneapolis Star* and *Arkansas Writers' Project*, which were content-based regulations of speech.[76]

¶ 45 Additionally, neither *Minneapolis Star* nor *Arkansas Writers' Project* actually stand for the blanket proposition that a tax, whether general or differential, can never burden protected First Amendment expression. Instead, they simply confirm the already well-established rule that content-based regulations of speech are presumptively unconstitutional.[77] They also evidence an understandable concern for regulations that directly implicate the freedom of the press.[78] This is made clear by *Leathers v. Medlock*, in which the Supreme Court, in distinguishing that case from *Minneapolis Star* and *Arkansas Writers' Project*, clarified that a tax scheme that does not target specific ideas or viewpoints on its face, and that is not structured or enacted in order to

---

[75] 481 U.S. 221 (1987).

[76] *Leathers v. Medlock*, 499 U.S. 439, 445-47 (1991).

[77] *See Leathers*, 499 U.S. at 447 (stating that *Minneapolis Star* and *Arkansas Writers' Project* "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints").

[78] *See, e.g., Minneapolis Star*, 460 U.S. at 585.

impose "a penalty for particular speakers or particular ideas," does not necessarily run afoul of the First Amendment.[79] As set out above, the Tax is neither facially discriminatory nor does the record or the Tax's structure establish that it was enacted with the predominant purpose of suppressing protected expression.

¶ 46 Finally, the taxes in *Minneapolis Star* and *Arkansas Writers' Project* were sales and use taxes imposed on the necessary materials for newspaper publishing and sales of magazines, respectively. The affected publishers could not avoid paying the taxes if they wanted to continue to operate as newspapers and magazines.[80] In contrast, Plaintiffs, and other erotic dancing clubs, can avoid the Tax and continue to operate as erotic dance clubs simply by requiring their dancers to use G-Strings and pasties. The effect on the erotic message is minimal. The Tax simply imposes a cost on using a particular means of expression rather than on the expression itself – a distinction that the Supreme Court has expressly acknowledged as significant in *Erie*.[81]

---

[79] *Leathers*, 499 U.S. at 449.

[80] *See Minneapolis Star*, 460 U.S. at 577 (large circulation newspaper subjected to a use tax on the cost of paper and ink products used for publication); *Arkansas Writers' Project*, 481 U.S. at 224 (sales tax imposed on small group of nonexempt magazines).

[81] *Erie*, 529 U.S. at 292-93.

¶ 47 Accordingly, we conclude that the Tax is narrowly tailored and that it satisfies the fourth prong of the *O'Brien* test. Having determined that the Tax is a content-neutral regulation of conduct that passes the *O'Brien* test, we now turn to Plaintiffs' argument that the tax is unconstitutionally overbroad.

III. THE TAX IS NOT UNCONSTITUTIONALLY OVERBROAD BECAUSE IT DOES NOT PROHIBIT A SUBSTANTIAL AMOUNT OF PROTECTED EXPRESSION

¶ 48 In addition to arguing that the Tax is unconstitutional under traditional First Amendment analysis, Plaintiffs contend that the Tax is facially unconstitutional because it is overbroad. The Supreme Court's overbreadth doctrine recognizes that a regulation that "punishes a 'substantial' amount of protected speech, 'judged in relation to the statute's plainly legitimate sweep,'" is unconstitutional on its face.[82] The overbreadth doctrine allows a plaintiff to mount a facial challenge to a statute, even if the statute, as applied to that plaintiff, is constitutional. In other words, it enables a plaintiff to challenge a

---

[82] *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

statute based on how it impacts the rights of parties not before the court.[83]

¶ 49 The purpose of the overbreadth doctrine is to ensure that First Amendment rights are not impermissibly chilled by an overbroad statute.[84] Even though the person against whom an overbroad statute is enforced always has the right to mount an "as applied" constitutional challenge, the Supreme Court has justified the existence of the overbreadth doctrine on the ground that such a person may be reluctant to assert his First Amendment rights due to the cost of litigation and the potential for enforcement sanctions.[85]

¶ 50 Nevertheless, despite its important role in providing a remedy to ensure that First Amendment

---

[83] *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) ("[T]he allowance of a facial overbreadth challenge to a statute is an exception to the traditional rule that 'the person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" (quoting *New York v. Ferber*, 458 U.S. 747, 767 (1982))).

[84] *Hicks*, 539 U.S. at 119 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech – especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech." (internal citations omitted)).

[85] *Id.*

rights are not impermissibly chilled, the overbreadth doctrine is "strong medicine"[86] that "suffices to invalidate *all* enforcement of the law,"[87] whether legitimate or not, and the Supreme Court has cautioned against its being "casually employed."[88] "[T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct."[89] The key mechanism by which the Court has prevented overuse of the overbreadth doctrine is "vigorous[ ] enforce[ment] [of] the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[90]

¶ 51 The Tax, as set out above, is narrowly tailored and, therefore, is not substantially overbroad. To begin with, the Tax regulates conduct rather than expression. The Supreme Court has stated that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is

---

[86] *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008) (internal quotation marks omitted).

[87] *Hicks*, 539 U.S. at 119 (emphasis in original).

[88] *Williams*, 128 S. Ct. at 1838 (internal quotation marks omitted).

[89] *Hicks*, 539 U.S. at 119 (internal quotation marks omitted).

[90] *Williams*, 128 S. Ct. at 1838 (emphasis in original).

not specifically addressed to speech or conduct necessarily associated with speech (such as picketing or demonstrating)."[91] As described above, the Tax is a content-neutral regulation of noninherently expressive conduct and therefore falls within this class of cases.

¶ 52 Additionally, the Tax is narrowly drawn in that it is directed toward a means of expression rather than expression itself. It does not prohibit the expression of any message; it simply imposes a cost on using a particular means of expressing a viewpoint – whatever the viewpoint may be.

¶ 53 Finally, the 30-day exemption period further limits the Tax's impact on protected expression. As a result, regardless of whether the Tax impacts protected expression in theater productions and nude dancing clubs, its impact on protected expression is de minimis rather than substantial. For this reason, we conclude that the Tax is not unconstitutionally overbroad.

IV. THE STATUTORY PROVISIONS APPLYING THE TAX TO ESCORT SERVICES ARE UNCONSTITUTIONALLY VAGUE

¶ 54 In order to be unconstitutionally vague, a statute must either (1) fail to "give the person of ordinary intelligence a reasonable opportunity to know

---

[91] *Hicks*, 539 U.S. at 124.

what is prohibited, so that he may act accordingly,"[92] or (2) be written in a way that encourages arbitrary and discriminatory enforcement.[93] As the primary trigger for applying the Tax to escort services, the term "escort" is defined in the Tax in a way that fails to provide relatively clear guidelines regarding what conduct is subject to the Tax. Accordingly, we determine that the statutory provisions applying the Tax to escort services are unconstitutionally vague.

¶ 55 The escort services provisions of the Tax are vague for the reasons enunciated by the United States Supreme Court in *City of Chicago v. Morales.* In *Morales,* the Court held that an ordinance prohibiting loitering was unconstitutionally vague when the ordinance defined "loitering" as "remain[ing] in any one place with no apparent purpose."[94] Reasoning that the City of Chicago could not "conceivably have meant to criminalize each instance a citizen stands in public,"[95] the Court concluded that the ordinance was impermissibly vague because it failed to adequately distinguish what "loitering is covered by the ordinance and what is not."[96]

¶ 56 Like the loitering ordinance in *Morales,* the statutory provisions applying the Tax to escort

---

[92] *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972).

[93] *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999).

[94] *Id.* at 57.

[95] *Id.*

[96] *Id.*

services fail to provide a person of ordinary intelligence guidance as to what conduct will trigger the Tax and what conduct will not. The Tax defines an "escort" as anyone who accompanies another for compensated companionship.[97] Nowhere does the statute define an escort in terms of nudity. The statute also fails to define the term "companionship." Therefore, according to the plain terms of the statute, individuals who are paid for providing care for the elderly as well as those who are paid as tour guides would fall within the definition of an "escort," and any person or business who employs them would be subject to the Tax.

¶ 57 The legislature could not conceivably have intended that companions for the elderly and tour guides would be subject to the Sexually Explicit Business and Escort Services tax. Yet, like the ordinance struck down in *Morales*, the Tax fails to provide adequate information for a person of ordinary intelligence to distinguish between those types of compensated companionship that the legislature intended would trigger application of the Tax and those that it intended would not. This ambiguity also permits arbitrary enforcement by the Commission. Accordingly,

---

[97] Utah Code Ann. § 59-27-102(1) (2008) ("'Escort' means any individual who is available to the public for the purpose of accompanying another individual for: . . . companionship[,] . . . a salary[,] . . . a fee [,] . . . a commission[,] . . . hire[,] . . . profit, . . . or . . . any amount similar to an amount listed in this Subsection.").

we hold that the provisions of the statute applying the tax to escort services are unconstitutionally vague.

CONCLUSION

¶ 58 We uphold the district court's determination that the Tax is constitutional as a content-neutral regulation of conduct that satisfies the *O'Brien* incidental burdens test. We also hold that it is not unconstitutionally overbroad because it does not prohibit a substantial amount of protected speech. Finally, we determine that the statutory provisions applying the Tax to escort services are unconstitutionally vague.

¶ 59 Justice Wilkins, Justice Parrish, and Judge Orme concur in Associate Chief Justice Durrant's opinion.

¶ 60 Justice Nehring does not participate herein; Court of Appeals Judge Gregory K. Orme sat.

DURHAM, Chief Justice, dissenting in part and concurring in part:

¶ 61 I respectfully dissent in part and concur in part. I agree with the majority's analysis in Part IV

that the escort and companionship provisions of the Sexually Explicit Business and Escort Service Tax (the Tax) are unconstitutionally vague. I, however, do not agree with the majority's conclusion that the Tax is content neutral and thus subject to intermediate scrutiny.

¶ 62 Despite the majority's efforts to demonstrate otherwise, this case is not the same as *Erie*. Rather, the Utah Legislature has enacted a statute that, by its own terms, makes it a content-based tax on First Amendment expressive speech; hence strict scrutiny should apply. Because the Utah State Tax Commission (the Commission) cannot show that the Tax is necessary to serve a compelling state interest and is narrowly tailored to that end, I would hold that the Tax violates the First Amendment to the United States Constitution.

I. UNLIKE THE ORDINANCE IN *ERIE*, THE STATUTE BY ITS OWN TERMS STRATEGICALLY TAXES PROTECTED EXPRESSION AND IS THEREFORE A CONTENT-BASED TAX

¶ 63 The Tax imposes a ten percent gross receipts tax on sexually explicit businesses. Utah Code Ann. § 59-27-103 (2008). It defines a sexually explicit business as "a business at which any nude or partially denuded individual . . . performs any service . . . on the premises of the sexually explicit business . . . during at least 30 consecutive or nonconsecutive days

within a calendar year" for profit or compensation. *Id.* § 59-27-102(4).

¶ 64 Both parties agree that the nudity at issue, nude dancing, is afforded some First Amendment protection. Plaintiffs argue that the Tax is a content-based burden subject to strict scrutiny. The Commission contends that the Tax is aimed at secondary effects and is thus subject to intermediate scrutiny. Plaintiffs are correct.

¶ 65 The First Amendment to the United States Constitution protects artistic expression, which includes nude dancing. In *Barnes v. Glen Theatre, Inc.*, the Supreme Court of the United States concluded, by way of plurality, that nude dancing is entitled to some level of First Amendment protection. 501 U.S. 560, 566 (1991) (Rehnquist, C.J., O'Connor, J., and Kennedy, J., plurality) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment. . . ."); *id.* at 581 (Souter, J., concurring) ("[A]n interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection."); *id.* at 592 (White, J., Marshall, J., Blackmun, J., and Stevens J., dissenting) ("The nudity is itself an expressive component of the dance. . . .").

¶ 66 This First Amendment protection of nude dancing is clear. It does not dissipate in the face of majority opinion or government decree. *See United States v. Playboy Entm't Group,* 529 U.S. 803, 818

(2000). Nor is it lessened because the expression is "not very important," "shabby, offensive, or even ugly." *Id.* at 826. Indeed, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989).

¶ 67 Because nude dancing is protected expression, a regulation that burdens such expression by reference to its content is a content-based regulation. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). For example, in *Playboy Entertainment,* the Court evaluated a statute designed to restrict children's viewing of sexually explicit programming. 529 U.S. at 806-10. The Court determined that "[t]he speech in question is defined by its content; and the statute which seeks to restrict it is content-based." 529 U.S. at 811. The statute "is not justified without reference to the content of the regulated speech." *Id.* (internal quotation marks omitted). "It focuses only on the content of the speech and the direct impact that speech has on its listeners." *Id.* (internal quotation marks omitted).

¶ 68 The Tax is a content-based regulation. It applies solely based on the narrow content of the business activity, namely, whether it involves nudity. While the Commission argues that the Tax could be applied conceptually to any type of business, this purported expansive reach does not make it content neutral. Just the opposite is true: it applies to exotic

dancing but not to traditional ballet, an art exhibit, or a theatrical performance. In short, it is the content of expression that triggers the Tax.

¶ 69 Further, the Tax cannot be considered content neutral in spite of the majority's heavy reliance on *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). While the plurality in that case found the ordinance *banning all public nudity* to be content neutral, it did so according to the general applicability of the terms of the ordinance. *Id.* at 290; *id.* at 307-08 (Scalia, J., concurring). That ordinance, "[b]y its terms . . . regulates conduct alone. *It does not target nudity that contains an erotic message;* rather, *it bans all public nudity,* regardless of whether that nudity is accompanied by expressive activity." *Id.* at 290 (emphases added).

¶ 70 The Tax, in contrast, by its terms, creates a strategic burden by limiting its application to those "sexually explicit businesses" at which nude or partially nude employees perform "during at least 30 consecutive or nonconsecutive days within a calendar year." Utah Code Ann. § 59-27-102(4)(b) (2008). Meanwhile, other businesses, such as theaters, art galleries, or dance companies, are allowed to continue their expressive activity without disruption.

¶ 71 The majority discounts this thirty-day trigger as analogous to the preamble in *Erie*, which Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Breyer regarded as the mere expression of the city council without any legal effect

and which could be construed to combat the negative secondary effects listed within the preamble. *See* 529 U.S. at 290-91. But here it is the text of the law itself, not a preamble, that contains the thirty-day limitation and thereby, as its title and terms indicate, targets "sexually explicit businesses." And, despite the majority's attempt to characterize this case as a carbon copy of *Erie,* there is no other reasonable interpretation of the thirty-day limitation. Unlike the preamble in *Erie,* the text of the law does not identify any secondary effects nor does it support, as the majority construes it, a balancing of "the state interest in providing sex offender treatment against the incidental burdens imposed on protected expression." Therefore, this case is not like *Erie,* where "[t]here [was] no basis for the contention that the ordinance d[id] not apply to nudity in theatrical productions such as Equus or Hair" because the ordinance's "text contain[ed] no such limitation." *Id.* at 308 (Scalia, J., concurring). Rather, the thirty-day limitation found in the text of the Tax makes it a content-based tax.

¶ 72 Indeed, if the Tax were truly content neutral, it would resemble the tax analyzed by the Colorado Court of Appeals in *Cinamerica Theatres, L.P. v. City of Boulder,* 50 P.3d 921 (Colo. Ct. App. 2002). That tax "applies to all places or events . . . regardless whether the activity involves protected speech and regardless of content," and taxes businesses and events "as diverse as Broadway-style dinner theater, live striptease and nude dancing, music concerts and live performances, theatrical performances,

radio shows, ballet performances, dance parties, fund-raising events, bars and nightclubs, and foot races." *Id.* at 926, 928-29. Such a tax "does not affect a limited range of views and does not threaten to suppress the expression of particular ideas or viewpoints." *Id.* at 929. (internal quotation marks and alteration omitted).

¶ 73 Instead, the Tax before us treats businesses differently in reference to the content of the expression involved and does so under the guise of a thirty-day "limitation," or in other words, a de facto exemption for the more accepted forms of expression involving nudity. As Justice Kennedy explained in his concurrence in *City of Los Angeles v. Alameda Books, Inc.*, "[T]he ordinance in *Renton* treat[ed] theaters that specialize in adult films differently from other kinds of theaters. The fiction that this sort of ordinance is content neutral – or 'content neutral' – is perhaps more confusing than helpful. . . . These ordinances are content based and we should call them so." 535 U.S. 425, 448 (2002) (second alteration in original) (internal quotation marks and citations omitted).

¶ 74 Therefore, despite the majority's analysis of the Tax under *Erie*, and without resort to the statements made by legislators in enacting the Tax, the Tax is not one of general applicability that regulates conduct alone. Rather, the Tax, by its terms, targets sexually explicit businesses that feature for thirty or more days per year the constitutionally protected expressive activity of nude dancing. Because it

does so, I would hold that the Tax is content based and thus subject to strict scrutiny.

II. THE SECONDARY EFFECTS DOCTRINE DOES NOT APPLY TO SAVE THE CONTENT-BASED TAX FROM STRICT SCRUTINY

¶ 75 Because the Tax regulates expression "based on its content, it must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). The Commission, however, argues that the Tax's constitutionality should be evaluated under intermediate scrutiny because it regulates based on negative secondary effects. However, the doctrine of secondary effects does not apply. The sole secondary effect the Commission identifies is sex offenses. This effect, however, lacks any empirical, reasonable connection to the viewing of nudity, which consequently makes the Tax a reaction to a primary effect.

¶ 76 Used as a time, place, and manner restriction on speech, the secondary effects doctrine has been invoked to uphold both the zoning and prohibition of nude dancing. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). In applying the secondary effects doctrine, a court must verify that (1) "'the predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech],'" and that (2) "a connection [exists] between the speech regulated by the ordinance and the

secondary effects that motivated the adoption of the ordinance." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440-41 (2002) (quoting *Renton*, 475 U.S. at 47). The burden of proving secondary effects lies with the government. *Doctor John's v. Wahlen*, 542 F.3d 787, 789 (10th Cir. 2008). Examples of secondary effects include, "providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects," *Erie*, 529 U.S. at 290; "effects . . . on the surrounding community, namely . . . crime rates, property values, and the quality of the city's neighborhoods," *Alameda Books*, 535 U.S. at 434; and "unsanitary conditions, unlawful sexual activity, and the transmission of sexually transmitted diseases," *Heideman v. S. Salt Lake City*, 165 Fed. Appx. 627, 631 (10th Cir. 2006).

¶ 77 Despite the Commission's arguments to the contrary, it has failed to identify *any* secondary effect that the Tax is designed to regulate. There is no concern about property values, crime, prostitution, sexually transmitted diseases, public intoxication, or other secondary effects in the neighborhoods surrounding the businesses. All the Commission argues is the effect on sex offenders "in general," without the benefit of any data identifying or establishing such effects. Moreover, the Commission does not claim that the sex offenders' crimes were connected in some way to the neighborhoods surrounding the businesses being taxed.

¶ 78 In *Ashcroft v. Free Speech Coalition*, the Supreme Court of the United States considered the constitutionality of a prohibition on virtual images of child pornography. 535 U.S. 234 (2002). The government had provided some evidence that individuals who view such child pornography may be predators. *Id.* at 253. The Court held that "[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." *Id.* at 253-54.

¶ 79 As in *Ashcroft*, no more than a remote connection has been shown here. The connection identified by the Utah Legislature is that the viewing of nudity leads to the perpetration of sex offenses, and thus a tax on nudity (and the incorporated expression of nude dancing) is justified to raise funds for sex offender treatment. The legislature failed to identify any evidence of cause and effect.

¶ 80 By anecdote and assumption, the legislature concluded that perhaps one-half of sex offenders may patronize sexually explicit businesses and escort services.[1] This remote connection causes

---

[1] Although I recognize that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, . . . whatever evidence the city relies

(Continued on following page)

the Tax to fall within the suspected primary effect of a tax on the form of expression, rather than on any impact to the immediate locale of the taxed businesses. Aside from absence of any evidence of cause and effect, even if we were to assume that there are individuals who would attend a nude dancing performance and would commit a sex crime because of

---

upon [must be] *reasonably* believed to be relevant to the problem. . . ." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (emphasis added). It also requires something more than "shoddy data or reasoning" to "fairly support the [government's] rationale for its ordinance." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion). That is not the case here. *See, e.g.*, Senate Floor Debate, H.B. 239, 55th Utah Leg., Gen. Sess. (March 2, 2004) (statement of Sen. Howard Stephenson) (explaining that from his understanding, "While most individuals who use sexually oriented businesses do not commit sex crimes, much, like most people who smoke don't get lung cancer, . . . there is a link between smoking and lung cancer for those who do and there is also a link in this for some."); Hearing on H.B. 239 Before the H. Revenue & Taxation Standing Comm. (Feb. 19, 2004) (statement of Att'y Gen. Mark Shurtleff) (recounting his office's experiences with the Internet Crimes Against Children Task Force that an individual traveled from Pennsylvania to Utah to "try and have sex with a 13 year-old girl," and the individual had admitted "to a lifetime full of [being an] Internet predator using chat rooms, hurting children, attending peep shows, [and] going to Pennsylvania [for] these other types [of] sexually explicit and oriented businesses"); Hearing on H.B. 230 Before the H. Revenue & Taxation Standing Comm. (Feb. 3, 2004) (statement of Kathy Ockey) ("I can give you anecdotal information based on my experience [with the Department of Corrections], but not statistics, and my experience is I would guess about half of the sex offenders I have dealt with over the last 18 years [are patrons of the escort services]").

what they viewed, under *Ashcroft* those crimes would constitute a *primary* effect, not a secondary one. Because of this remote connection and lack of secondary effects, "the lesser scrutiny . . . has no application to the content-based regulations targeting the primary effects of protected speech." *Playboy Entm't,* 529 U.S. at 815. Thus the Tax must be evaluated under strict scrutiny.

III. THE TAX FAILS STRICT SCRUTINY

¶ 81 "[A] tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech [or expression]." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). Content-based regulations are presumptively invalid and subject to strict scrutiny. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002). And "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Group*, 529 U.S. 803, 818 (2000).

¶ 82 Under strict scrutiny, the "State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Ark. Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 231 (1987). Moreover, "[i]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens

must satisfy the same rigorous scrutiny as its content-based bans." *Playboy Entm't,* 529 U.S. at 812. This holds especially true where "[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." *Ark. Writers' Project,* 481 U.S. at 228 (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 585 (1983)).

¶ 83 The Tax fails strict scrutiny. While the State has an interest in raising revenue to fund the treatment of sex offenders, it is not in the category of government interest so compelling as to burden constitutionally protected rights. Even if it were, the Commission has failed to demonstrate any factual or empirical connection between the expressive activity taxed and the need for sex offender treatment.

¶ 84 Further, even if a compelling interest existed, the statute is not narrowly tailored to achieve that interest. As noted above, the legislature failed to identify any cause and effect between sex offenders and nude performances. For example, the legislature heard the testimony of Kathy Ockey of the Department of Corrections regarding a study by Hanson and Brussiere, which demonstrated that having a paraphilia was the third top indicator of being a sex offender. A paraphilia was defined as an unusual, obsessive sexual interest, such as women's shoes or feathers. The legislature did not choose to tax women's shoes or feathers to provide funding for sex offenders. The only other testimony offered was an anecdotal report, unsupported by data, that perhaps

50 percent of sex offenders may frequent sexually explicit businesses and escort services. However, sex offenders may also frequent restaurants, hair dressers, amusement parks, tennis clubs, and gasoline stations. Attendance or use of these services does not cause individuals to become sex offenders, and no evidence was provided that attendance or use of sexually explicit businesses and escort services cause individuals to become sex offenders. In short, the legislature failed to identify any cause and effect between sex offenders and nude dancing; without doing so, it cannot narrowly tailor its regulation.

¶ 85 Raising money for sex offender treatment is a worthy goal. Nonetheless, the legislature cannot unconstitutionally tax protected speech to obtain the money. The State has not demonstrated it has a compelling reason to tax this speech. Even if it had a compelling interest, the Tax is not narrowly tailored to achieve the interest. Therefore, the Tax is an unconstitutional burden on First Amendment protections.[2]

CONCLUSION

¶ 86 The Tax by its own terms is a content-based tax. It is not a tax of general applicability. It is

---

[2] Because the Tax on sexually explicit businesses is unconstitutional under the First Amendment, I would not address the Plaintiffs' argument that the statute is unconstitutional under the Fourteenth Amendment or that the statute is overbroad.

not a tax motivated and justified by secondary effects. The majority's resort to *Erie* does not convince me otherwise. Because the Tax is content based, I would subject it to strict scrutiny and consequently hold that it is unconstitutional under the First Amendment to the United States Constitution.

SUSAN L. BARNUM (5444)
Assistant Attorney General
JAYSEN R. OLDROYD (9901)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Attorneys for Defendants
160 East 300 South, Fifth Floor
P.O. Box 140874
Salt Lake City, Utah 84114-0874
Telephone (801) 366-0375

IN THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY
SALT LAKE DEPARTMENT, STATE OF UTAH

BUSHCO, d.b.a. Babydolls Escorts, VALLEY RECREATION, Inc. d.b.a. Kitty's Escort and Angel's Escort, THE D. HOUSE, LLC d.b.a. The Doll House Plaintiffs, AMERICAN BUSH, INC. and DENALI, LLC, d.b.a. SOUTHERN EXPOSURE, Plaintiffs in Intervention, v. UTAH STATE TAX COMMISSION and PAM HENDRICKSON, R. BRUCE JOHNSON, PALMER DEPAULIS, and MARK B. JOHNSON, in their official capacities, as members of the Utah State Tax Commission Defendants.	FINAL JUDGMENT AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (Filed Jul. 3, 2007) Civil No. 040911691 Judge Medley

On June 4, 2007, before the Honorable Tyrone Medley, Plaintiffs' and Defendants' cross motions for summary judgment came before this court for oral argument. Andrew McCullough appeared on behalf of Plaintiffs and Susan L. Barnum and Jaysen R. Oldroyd, Assistant Utah Attorneys General, appeared on behalf of Defendants.

The Court heard oral argument on both Motions, considered the written Memoranda filed by both parties, reviewed the file, and made an oral ruling on the record on June 5, 2007; based thereon the Court now makes the following conclusions of law, based on the undisputed material facts.

1. The escort service Plaintiffs are entitled to First Amendment protection because they incorporate dancing services; thus for purposes of these cross-motions all the Plaintiffs will be treated as if they are entitled to the same First Amendment protection.

2. The sexually explicit business tax set forth in Utah Code Ann. § 59-27-101 et. seq. is content-neutral for First Amendment purposes because it falls on any business involving nudity in its services.

3. The sexually explicit business tax and the escort service tax are content-neutral, and the text for content-neutral laws that impact expressive conduct such as nude dancing set forth in *O'Brien v. United States*, 391 U.S. 367 (1968) applies. The statute meets the four *O'Brien* prongs as follows:

a. First, the legislature has the power to enact this law. The state can impose taxes and this prong is not in dispute.

b. Second, the law furthers a substantial government interest. As stated in the statute, the purpose of the tax is to raise revenue for sex offender treatment. The Legislature heard evidence that there is insufficient funding for sex offender treatment and sex offender recidivism rates are high without treatment and these reasons constitute a substantial government interest.

c. Third, the tax and statute is unrelated to the suppression of the expression that may be affected because seeking additional sex offender treatment funding is unrelated to the suppression of expression. Based on the evidence before the legislature the tax is designed to address negative secondary effects.

d. Fourth, the impact of the statute is not greater than necessary to achieve the desired result because the impact is de minimis; the restriction is not a complete restriction on nude dancing but only a 10% tax on conduct involving nudity, and so is no greater than necessary.

4. The tax on sexually explicit businesses and escort services does not violate the First Amendment.

5. The tax on sexually explicit businesses and escort services also does not violate the equal protection clause of the Fourteenth Amendment because it does not affect fundamental rights, and the

statute has a rational basis, which serves a substantial and legitimate government purpose of crime prevention by funding sex offender treatment.

6. Based on these conclusions, Defendants' Motion for Summary Judgment is granted and Plaintiffs' Motion for Summary Judgment is denied.

7. Judgment is hereby entered in favor of Defendants.

DATED this 3 day of July, 2007.

BY THE COURT:

/s/ Tyrone Medley
Tyrone Medley
Third District Court Judge

[SEAL]

Approved as to Form:

/s/ W. Andrew McCullough
Andrew McCullough
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2007, I caused to be served by U.S. mail, postage prepaid, a true and correct copy of the foregoing FINAL JUDGMENT AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT to the following:

W ANDREW MCCULLOUGH
MCCULLOUGH & ASSOCIATES LLC
6885 SOUTH STATE STREET SUITE 200
MIDVALE UT 84047

By Interoffice Mail to:

UTAH STATE TAX COMMISSION
210 NORTH 1950 WEST
SALT LAKE CITY UT 84134

/s/ Diane Sandberg

IN THE UTAH SUPREME COURT

– – – ooOoo – – –

Bushco, dba Babydolls Escorts, Valley Recreation, Inc. dba Kitty's Escorts and Angel's Escorts, The D. House, LLC dba The Doll House,

Plaintiffs and Appellants,

v.

Utah State Tax Commission and Pam Hendrickson, R. Bruce Johnson, Palmer Depaulis, and Mark B. Johnson, int their official capacities, as members of the Utah State Tax Commission,

Defendants and Appellees.

Case No. 20070559-SC

– – –

ORDER

(Filed Feb. 2, 2010)

This matter is before the court upon the Appellant's Petition for Rehearing filed on December 30, 2009 and the State's Petition for Rehearing, filed on January 4, 2010.

IT IS HEREBY ORDERED that pursuant to Rule 35 of the Utah Rules of Appellate Procedure the Petitions for Rehearing are denied.

For The Court:

2-2-10
Date

/s/ Matthew B. Durrant
Matthew B. Durrant
Associate Chief Justice

Utah Code Ann.

59-27-101. Title.

This chapter is known as the "Sexually Explicit Business and Escort Service Tax."

59-27-102. Definitions.

(1) "Escort" means any individual who is available to the public for the purpose of accompanying another individual for:

(a) companionship; and

(b)(i) a salary;

(ii) a fee;

(iii) a commission;

(iv) hire;

(v) profit; or

(vi) any amount similar to an amount listed in this Subsection (1)(b).

(2) "Escort service" means any person who furnishes or arranges for an escort to accompany another individual for:

(a) companionship; and

(b) (i) a salary;

(ii) a fee;

(iii) a commission;

(iv) hire;

(v) profit; or

(vi) any amount similar to an amount listed in this Subsection (2)(b).

(3) "Nude or partially denuded individual" means an individual with any of the following less than completely and opaquely covered:

(a) genitals;

(b) the pubic region; or

(c) a female breast below a point immediately above the top of the areola.

(4) "Sexually explicit business" means a business at which any nude or partially denuded individual, regardless of whether the nude or partially denuded individual is an employee of the sexually explicit business or an independent contractor, performs any service:

(a) personally on the premises of the sexually explicit business;

(b) during at least 30 consecutive or nonconsecutive days within a calendar year; and

(c) for:

(i) a salary;

(ii) a fee;

(iii) a commission;

(iv) hire;

(v) profit; or

(vi) any amount similar to an amount listed in this Subsection (4)(c).

59-27-103. Tax imposed on a sexually explicit business – Tax imposed on an escort service.

(1) A tax is imposed on a sexually explicit business equal to 10% of amounts paid to or charged by the sexually explicit business for the following transactions:

(a) an admission fee;

(b) a user fee;

(c) a retail sale of tangible personal property made within the state;

(d) a sale of:

(i) food and food ingredients as defined in Section **59-12-102**; or

(ii) prepared food as defined in Section **59-12-102**;

(e) a sale of a beverage; and

(f) any service.

(2)(a) Except as provided in Subsection (2)(b), a tax is imposed on an escort service equal to 10% of amounts paid or charged by the escort service for any

transaction that involves providing an escort to another individual.

(b) Notwithstanding Subsection (2)(a), the tax imposed by Subsection (2)(a) does not apply to a transaction that is subject to the tax imposed in Subsection (1).

(3) The tax imposed by this section:

(a) may not be imposed on any sales and use tax collected or paid under Chapter 12, Sales and Use Tax Act; and

(b) is subject to an agreement sales and use tax under Chapter 12, Sales and Use Tax Act.

(4) The commission shall administer this chapter in accordance with Chapter 12, Part 1, Tax Collection.

59-27-104. Payment of tax.

(1) Subject to Subsection (2), a sexually explicit business or escort service subject to the tax imposed by this chapter shall file a return with the commission and pay the tax calculated on the return to the commission:

(a) quarterly on or before the last day of the month immediately following the last day of the previous calendar quarter if:

(i) the sexually explicit business or escort service is required to file a quarterly sales and use tax return with the commission under Section **59-12-107**; or

(ii) the sexually explicit business or escort service is not required to file a sales and use tax return with the commission under Chapter 12, Sales and Use Tax Act; or

(b) monthly on or before the last day of the month immediately following the last day of the previous calendar month if the sexually explicit business is required to file a monthly sales and use tax return with the commission under Section **59-12-108**.

(2) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules to:

(a) establish standards for determining whether an operation is a sexually explicit business or escort service; and

(b) determine, for purposes of Section **59-27-102**, amounts that are similar to an amount paid for:

(i) a salary;

(ii) a fee;

(iii) a commission;

(iv) hire; or

(v) profit.

59-27-105. Sexually explicit business and escort service fund.

(1) There is created a restricted special revenue fund called the "Sexually Explicit Business and Escort Service Fund."

(2)(a) Except as provided in Subsection (3), the fund consists of all amounts collected by the commission under this chapter.

(b)(i) The monies in the fund shall be invested by the state treasurer pursuant to Title 51, Chapter 7, State Money Management Act.

(ii) All interest or other earnings derived from the fund monies shall be deposited in the fund.

(3) Notwithstanding any other provisions of this chapter, the commission may retain an amount of tax collected under this chapter of not to exceed the lesser of:

(a) 1.5%; or

(b) an amount equal to the cost to the commission of administering this chapter.

(4)(a) Fund monies shall be used as provided in this Subsection (4).

(b) The Department of Corrections shall use 60% of the monies in the fund, in addition to existing budgets, to provide treatment services to nonworking or indigent adults who:

(i) have been convicted of an offense under Title 76, Chapter 5, Part 4, Sexual Offenses; and

(ii) are not currently confined or incarcerated in a jail or prison.

(c) The Adult Probation and Parole section of the Department of Corrections shall use 15% of the monies in the fund to provide outpatient treatment services to individuals who:

(i) have been convicted of an offense under Title 76, Chapter 5, Part 4, Sexual Offenses; and

(ii) are not currently confined or incarcerated in a jail or prison.

(d) The Department of Corrections shall use 10% of the monies in the fund, in addition to existing budgets, to implement treatment programs for juveniles who have been convicted of an offense under Title 76, Chapter 5, Part 4, Sexual Offenses.

(e) The attorney general shall use 15% of the monies in the fund to provide funding for any task force:

(i) administered through the Office of the Attorney General; and

(ii) that investigates and prosecutes individuals who use the Internet to commit crimes against children.

59-27-106. Records.

(1) An owner or operator of a sexually explicit business or escort service shall maintain records, statements, books, or accounts necessary to determine the amount of tax for which the owner or operator is liable to pay under this chapter.

(2) The commission may require an owner or operator of a sexually explicit business or escort service, by notice served on the person, to make or keep the records, statements, books, or accounts described in Subsection (1) in a manner in which the commission considers sufficient to show the amount of tax for which the owner or operator is liable to pay under this chapter.

(3) After notice by the commission, the owner or operator of a sexually explicit business or escort service shall open the records, statements, books, or accounts specified in this section for examination by the commission or an authorized agent of the commission.

* * *

59-27-108. Penalties and interest.

An owner or operator of a sexually explicit business or escort service that fails to comply with this chapter is subject to:

(1) penalties provided in Section **59-1-401**; and

(2) interest provided in Section **59-1-402**.